160 U.S. 293

TRANSCRIPT OF RECORD.

160-203

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 693.

JOHN ALLISON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

FILED AUGUST 6, 1895.

(15983.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 693.

JOHN ALLISON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

INDEX.

	Original.	Print.
Caption	a	1
Indictment	1	1
Arraignment and plea	3	2
Order filing application for witnesses at public expense	3	2
Order setting cause for trial at next term	3	2
Order granting application for witnesses at public expense	3	2
Order granting application for additional witnesses at public expense	4	2
Order beginning trial	4	2
Order continuing trial	5	3
Order continuing trial	6	4
Verdict	6	4
Judgment and sentence	7	4
Order allowing bill of exceptions, etc	8	5
Order staying execution	8	5
Note by the clerk as to omissions from bill of exceptions	9a	6
Request of Assistant Attorney-General to omit parts of bill of exceptions in printing the record	9b	6
Statement of contents of bill of exceptions	9d	6
Testimony of John Allison	9d	6
O. H. Knapp	9e	10
Ellen Turner	9f	12
Dora Thompson	9f	14
Minor Perkins	9f	14
Jasper Allison	9g	14
Minor Allison	9g	14
Albert Allison	9g	15
Robert Allison	9g	17
Margaret Allison	9g	17
J. D. Hall	9h	18
J. Warren Reed	9h	19
S. Cope Blake	9h	21

	Original.	Print.
Testimony of Minor Perkins	9i	23
E. C. Alberty	9i	23
Margaret Allison (recalled)	9i	23
Cart Crowder	9i	25
Robert Isley	9i	27
Bill of exceptions	9	9
Evidence for the Government (omitted in printing)	9	9
Testimony of John Farris (omitted in printing)	10	
P. H. Farris (omitted in printing)	22	
C. C. Lowther (omitted in printing)	26	
Jack Farris (omitted in printing)	31	
Andrew J. Lowther (omitted in printing)	32	
Robert Isley (omitted in printing)	39	
Andrew J. Lowther (recalled) (omitted in printing)	44	
John Moore (omitted in printing)	47	
Jack Farris (recalled) (omitted in printing)	51	
Robert Isley (recalled) (omitted in printing)	57	
Government rests (omitted in printing)	59	
Evidence for defendant (omitted in printing)	59	
Testimony of P. H. Farris (omitted in printing)	60	
John Allison (omitted in printing)	62	
O. H. Knapp (omitted in printing)	93	
Mrs. Ellen Turner (omitted in printing)	105	
Dora Thompson (omitted in printing)	116	
Minor Perkins (omitted in printing)	118	
Jasper Allison (omitted in printing)	122	
Minor Allison (omitted in printing)	128	
Albert Allison (omitted in printing)	131	
Robert Allison (omitted in printing)	134	
Margaret Allison (omitted in printing)	139	
J. D. Hall (omitted in printing)	148	
Doug. Binns (omitted in printing)	153	
Frank Rucker (omitted in printing)	157	
Robert Allison (recalled) (omitted in printing)	166	
J. Warren Reed (omitted in printing)	168	
S. C. Blake (omitted in printing)	178	
Minor Perkins (recalled) (omitted in printing)	183	
E. C. Alberty (omitted in printing)	185	
Mrs. Margaret Allison (recalled) (omitted in printing)	190	
Evidence for the Government in rebuttal (omitted in printing)	193	
Testimony of Cart Crowder (omitted in printing)	194	
John P. Dallas (omitted in printing)	198	
Robert Isley (omitted in printing)	200	
John Farris (omitted in printing)	202½	
Charge of the court	204	27
Exceptions to charge	245	50
Verdict	247	51
Judge's certificate to bill of exceptions	247	51
Assignment of errors	248	51
Petition for writ of error	253	54
Affidavit of poverty	254	55
Writ of error	255	55
Citation	256	56
Clerk's certificate	257	56

a In the circuit court of the United States for the western district of Arkansas.

Pleas and proceedings before the Honorable Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas, holding circuit court in the case of—

UNITED STATES)
vs. Indictment for murder. No. 103.
JOHN ALLISON.)

1 *Indictment.*

United States of America, western district of Arkansas, in the circuit court, Feb'y term, A. D. 1895.

UNITED STATES)
vs. Murder.
JOHN ALISON.)

The grand jurors of the United States of America, duly selected, empaneled, sworn, and charged to inquire in and for the body of the western district of Arkansas aforesaid, upon their oath present:

That John Alison, on the 5th day of January, A. D. 1895, at the Cherokee Nation, in the Indian country, within the western district of Arkansas aforesaid, with force and arms, in and upon the body of one William Alison, a white man and not an Indian, then and there being, feloniously, willfully, and of his malice aforethought, did make an assault; and that the said John Alison, with a certain gun then and there charged with gunpowder and one leaden bullet, which said gun he, the said John Alison, in his hand then and there had and held, then and there feloniously, wilfully, and of his malice aforethought, did discharge and shoot off to, against, and upon the said William Alison; and that the said John Alison, with the leaden bullet aforesaid, out of the gun aforesaid, then and there, by force of the gunpowder aforesaid, by the said John Alison discharged and shot off as aforesaid, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound him, the said William Alison, in and upon the left side and back of the head, right side of back, and left breast of him, the said William Alison, giving to him, the said William Alison, then and there, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the gun aforesaid, by the said John Alison, in and upon the left side and back of the head and right side of back and left breast of him, the said William Alison, one mortal wound of the depth of four inches and of the breadth of half an inch, of which said mortal wound he, the said William Ali-
2 son, then and there instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say that the said John Alison, him, the said William Alison, in the manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

JAS. F. READ,
United States Attorney, Western District of Arkansas.

(Endorsed on back:) No. 103. United States vs. John Alison. Murder. A true bill. L. H. Southmayd, foreman. Witnesses: John Farris, Prior Creek, I. T.; Jack Farris, Prior Creek, I. T.; P. H. Farris, Prior Creek, I. T.; Andrew Lowther, Claremore; C. C. Lowther, Claremore; Robert Isley, Prior Creek; Chet Crowder, Prior Creek; Jno. P. Dallas, Prior Creek; Jno. Moore, Prior Creek. Filed in open court Feb'y 6th, 1895. Stephen Wheeler, clerk, by I. M. Dodge, D. C.

3 *Record entries.*

In the circuit court of the United States for the western district of Arkansas, Feb. term, 1895, Wednesday morning, 8½ o'clock, Feb. 6, 1895.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

UNITED STATES } Indictment for murder. No. 103.
vs.
JOHN ALLISON. }

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorney, and having had hearing of said indictment and it being demanded of him concerning said indictment above specified and charged upon him how he would acquit himself thereof, he says he is not guilty as charged in said indictment and puts himself upon the country.

MONDAY, *Feb. 11, 1895.*

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States.

SATURDAY, *Feb. 16, 1895.*

(Caption omitted.)

Ordered by the court that this cause be, and the same is hereby, continued to the next term of this court and set down for trial May 16, 1895.

(Caption omitted.)

On this day come on to be heard the application heretofore, Feb. 13, 1895, filed for witnesses in this cause, and the court being fully advised in the premises doth allow the same. It is therefore ordered that
4 the legal expense of procuring the testimony of Margaret Allison, Robt. Allison, Margaret Turner, Dora Thompson, Miner Perkins, Miner Allison, Oliver Knapp, Shade Alberty, Jasper Allison, and Frank Rucker in behalf of said defendant be paid by the United States and that a subpœna be issued for them returnable May 16, 1895.

MAY TERM, 1895, MONDAY, *May 6, 1895.*

(Caption omitted.)

On this day come the said defendant, by his attorney, and files an additional application, verified upon oath, praying for additional witnesses in his behalf at the expense of the United States. Said application coming on to be heard and the court being fully advised in the premises doth allow the same. It is therefore ordered that the legal expense of procuring the testimony of Surat Cudington, John Hall, Cake Blake, and Wm. Pharris in behalf of said defendant be paid by the United States and that a subpœna be issued for them returnable May 16, 1895.

THURSDAY, *May 23, 1895.*

(Caption omitted.)

On this day come the said defendant, by his attorney, and files his application, verified upon oath, praying for witnesses in his behalf at the expense of the United States, which was by the court allowed for Dug Bims, and a subpœna ordered to be issued for him returnable forthwith.

FRIDAY, *May 24, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant, in custody of the marshal and by his attorneys, J. W. Reed, esq., and Thos. H. Barnes, esq., and it appearing from the returns of the marshal that the said defendant has been served with a duly certified copy of the indictment in this cause, and a full and complete list of the witnesses in this cause, and that he has also been served with a full and complete list of the panel of petit jurors and alternates, as selected and drawn by the jury commissioners for the present term of this court, more than two entire days heretofore; and the said defendant having heretofore had hearing of said indictment and pleaded not guilty thereto, it is, on motion of plaintiff by its attorney, ordered by the court that a jury come to try the issue joined: Whereupon, after counsel for both plaintiff and defendant had exercised, in the presence of the defendant, their full right of challenge under the law, the following jurors were empaneled for the trial of this cause, to wit: John W. Andrews, Sam'l N. Alexander, William Frye, Elmo T. Lusk, Dennis P. Mosley, Wilshire Pruett, Marion Trammell, Wm. Werner, Fred Adams, Levi P. Boren, Thos. B. Brown, Joseph A. Fallen, twelve good and qualified electors of the district aforesaid, duly selected, empaneled, and sworn to try the issue joined and a true verdict render according to the law and the evidence. And after hearing a portion of the evidence, and there not being time to further progress in the trial of this cause, they were put in charge of a sworn bailiff of this court. And it is further ordered that the marshal furnish meals and lodging to said jury and bailiff in charge until discharged by order of said court.

SATURDAY, *May 25, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defend-

ant in custody of the marshal and by his attorneys, J. W. Reed, esq., and Thos. H. Barnes, esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit, John W. Andrews, Sam'l N. Alexander, William Frye, Elmo T. Lusk, Dennis P. Mosley, Wilshire Pruett, Marion Trammell, Wm. Werner, Fred Adams, Levi P. Boren, Thos. B. Brown, Joseph A. Fallen,
6 who took their seats in the jury box and after hearing the remainder of the evidence and a portion of the argument of counsel and there not being time to further progress in the trial of this cause they were put in charge of a sworn bailiff of this court.

MONDAY, *May 27, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, J. W. Reed, esq., and Thos. H. Barnes, esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit, John W. Andrews, Sam'l N. Alexander, William Frye, Elmo T. Lusk, Dennis P. Mosley, Wilshire Pruett, Marion Trammell, William Werner, Fred Adams, Levi P. Boren, Thos. B. Brown, Joseph A. Fallen, who took their seats in the jury box and after hearing the remainder of the argument of counsel and receiving the charge of the court, to which said charge the defendant, by his attorneys, files his exceptions. Whereupon said jury retired in charge of the sworn bailiff aforesaid to consider of their verdict.

TUESDAY, *May 28, 1895.*

(Caption omitted.)

On this day come the United States of America, by Jas. F. Read, esq., attorney for the western district of Arkansas, and come the said defendant in custody of the marshal and by his attorneys, J. W. Reed, esq., and Thos. H. Barnes, esq.; and now come the jury heretofore empaneled for the trial of this cause in charge of a sworn bailiff of this court, to wit, John W. Andrews, Sam'l N. Alexander, William Frye, Elmo T. Lusk, Dennis P. Mosley, Wilshire Pruett, Marion Trammell, William Werner, Fred Adams, Levi P. Boren, Thos. B. Brown, Joseph A. Fallen, who returned into court the following verdict, to wit:

"We, the jury, find the defendant, John Allison, guilty of murder as charged in the within indictment.

(Signed) "JOSEPH A. FALLEN, *Foreman.*"

7 Whereupon by order of the court the jury was discharged from the further consideration of the case, and the said defendant was remanded to the custody of the marshal to await final sentence.

TUESDAY, *July 9, 1895.*

(Caption omitted.)

On motion of Jas. F. Read, esq., attorney for the western district of Arkansas, the said defendant John Allison was brought to the bar of this court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause

on the 28th day of May, 1895, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said John Allison be deemed taken and adjudged guilty of the crime of murder, and it is ordered by the court that the said marshal of the district aforesaid cause the said John Allison to be taken hence and him, the said John Allison, safely and securely keep from the date hereof until Tuesday, the 1st day of Oct., A. D. 1895, and on that day and between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of said day, the said marshal cause the said John Allison to be taken to some convenient place within this district to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon on Tuesday, the said 1st day of October, in the year of our Lord one thousand eight hundred and ninety-five, cause the said John Allison to be hanged by the neck until he is dead. And it is further considered by the court that the United States of America do have and recover all their costs in and about this prosecution laid out and expended and that they have execution therefor. And the clerk of this court is hereby required to furnish the marshal of this district with a duly
8 certified copy of this judgment, sentence, and order, which shall be returned by said marshal, with a full and true account of the execution of the same.

FRIDAY, *July 12, 1895.*

(Caption omitted.)

Comes defendant by his attorney, J. Warren Reed, and presents his bill of exceptions and asks that the same be signed and made a part of the record in this cause, which is accordingly done.

And at the same time presents his assignment of errors and petition for writ of error to the Supreme Court of the United States, together with his petition, supported by affidavit, praying for an appeal in this cause at the expense of the United States, which assignment and petition, &c., are ordered filed.

SATURDAY, *July 13, '95.*

(Caption omitted.)

On this day comes the clerk of this court and makes known that a writ of error taking this case to the Supreme Court of the United States has been issued by him.

It is therefore hereby ordered by the court that execution of sentence heretofore pronounced in this cause be stayed pending the action of the Supreme Court.

9 *Bill of exceptions.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES)
vs.) Murder.
JOHN ALLISON.)

Be it remembered that on the 24 day of May, 1895, the same being a day of the May term of the United States circuit court for the western

district of Arkansas, came on to be heard the above-entitled cause, when the following proceedings were had, to wit:

* * * * * * *

9a [Note by the clerk: Pages 9 to 202½ of the bill of exceptions are omitted in printing at the request of the Attorney-General, whose request and statement here follow:]

9b DEPARTMENT OF JUSTICE,
Washington, D. C., November 2, 1895.

J. H. MCKENNEY, Esq.,
Clerk U. S. Supreme Court:

DEAR SIR: I return herewith the original transcript of record in the case of John Allison et al. v. United States, No. 693, of this term. I find on examination that a large part of the bill of exceptions is absolutely immaterial. I therefore request on behalf of the United States, which is obliged to pay for what printing is done in the case, that you omit from the bill of exceptions the entire testimony (beginning with the second paragraph on page 9 and ending with the foot of page 202½), and insert instead thereof the enclosed statement.

You will notice that at frequent intervals in the enclosed statement the word "indent" is inserted in brackets. In each place this word represents a passage from the bill of exceptions which is indicated by
9c marks at the beginning and end of the passage in red pencil. The paging referred to is the red ink paging in the left hand corner of the page. I trust that the Public Printer will find no difficulty in following these directions.

Very truly, yours,

EDWARD B. WHITNEY,
Assistant Attorney-General.

9d [The assignments of errors relate wholly to the charge of the court, except certain assignments relating to an alleged lost letter referred to by Margaret Allison in her testimony. The greater part of the testimony is unnecessary to print at length for the purposes of this bill of exceptions. Those portions are, however, printed which contain the testimony offered by defendant as to the killing of deceased and his alleged threats against defendant's life.]

The testimony for the prosecution tended to show that the defendant, John Allison, without any provocation, whatever, encountering his father, William Allison, near the barn of one John Farris, with whom the latter was residing, shot him three times in cold blood, the two last times after William Allison had fallen to the ground. The testimony of the eye-witnesses of the encounter is to be found at MS. pages 10–11, 32–8, 39–42, 44. Other witnesses were close by, but did not actually see the affair.

John Allison, the defendant, testified that he was 18 years old, and had lived in the Indian country a little over a year; that he was born in Oregon, and came from the State of Washington, where he had lived 13 years; that he had been on a deer hunt the day before the killing with one Rucker, and was to join him for another hunt that morning.

He testified about the killing and its inducement as follows (MS., pages 65–8):

Q. Did you go to meet Rucker?

A. In the morning I started over to Mr. Rucker's, and as I got right opposite the barn I seen what I believed to be my brother up there. It was my brother's overcoat. Jack Farris had it on.

Q. You saw your brother where?

A. I saw Jack Farris with my brother's overcoat on, and I thought it was my brother; and he had been working off—he hadn't been home for about a week or ten days; and I thought I would go and see him.

Q. Where did you go?

A. He was up there at the barn, and I thought I would just ride up to the barn and talk to him a few minutes and ride off. As I come to the barn——

Q. Just go on and tell now all that occurred after that.

A. It wasn't my brother. It was Jack Farris; he had my brother's coat on. The two Lowthers were there. I forget their names. And I talked a few minutes there, and they asked me where I was going, and I told them I was going hunting with Frank Rucker; that we were going to see if we could kill a deer that day; and I saw my brother up at the house, and I thought I would wait there just a minute and he would be down. He would have to come right by there. He had to take a load of furniture to town, and he would have to come right down by there and I would see him. I knew my father was up at the house, and I didn't want to go up by the house for I was afraid he might raise a racket, and I did not want to raise any racket with him; and I just staid at the barn, and the first thing I knew he came out to the corner of the house and went back in, and came out again, went down to the barn—he came right through the gate, never went to the right or left either, but just came right straight towards me. He just came right up, and he got about 12 or 15 feet from me, and he says, "You have got it, have you?" and he throwed his hand back like he was going to get a pistol, and made a demonstration that way, and the threats he had made led me to believe that he was going to draw a pistol, and I just raised—I didn't have no shell in the barrel there, and I just threw one in as quick as I could to keep him from shooting me, and I threw in again and shot the third time, and as I shot the third time he fell, and I never shot any more then. I throwed a shell in my gun and walked around the barn to catch my horse. He had run off around the barn.

Q. When you shot, how close were you to the barn do'r?

A. I was about four feet, I expect, to the best of my knowledge. I was standing right in the barn door talking to Mr. Lowther, and as he was coming through the gate I thought I would step to one side, and if he wanted to go in the barn it would be all right, and I would not be in his way. I made about one or two steps to the right, and I stood there, and he came right straight towards me and never went towards the door. He came right straight towards me.

Q. You say when he come up that close to you he made that remark?

A. Yes, sir; he says, "You have got it, have you?" and made a demonstration——

Q. Describe what position he put himself in.

A. He was coming right straight towards me, and he throwed himself like that, and as he throwed his hand back that way I raised up and fired, and I shot him right here [indicating].

Q. Did he turn himself like you have indicated to you?

A. Yes, sir; he turned himself like that.

Q. When you commenced firing did you keep up the fire?

A. Yes, sir; I fired three shots just as fast as I could shoot.

Q. Can you shoot pretty quick?

A. Yes, sir; I am pretty fast with a Winchester.

Q. Did you advance on him?

A. I made, I guess, about one step. I was excited a little. I made one step as I fired the first shot. I made but one step while I was working the lever.

Q. You worked it as quick as you could?

A. Yes, sir; I fired three shots, one right after another, as rapidly as most any man could shoot.

Q. Did you know whether you had hit him or not?

A. No, sir; I don't know whether I had hit him any shot until the last shot, when he gave down, and then I stopped.

Q. Did you shoot him at any time after he had fallen?

A. No, sir; I never shot him after he had fell.

Q. You say that you believed that he had a pistol?

A. Yes, sir; in fact I knew he had one, because he always carried one, and he always carried it in his hip pocket.

68 Q. Where had he carried one?

A. Right in his hip pocket there.

Q. Where had you known him to carry one?

A. He always carried it right there all the 'ime in Washington; he always carried his gun, ever since I can remember; he carried a six-shooter.

Q. Now, had he ever made any assaults or attempts upon you before?

A. Yes, sir; in Washington he made an attempt on me one day with a rock after he left home; he tried to kill me, and I got out of his way.

Q. Who was present when that was done?

A. Mrs. Turner, my sister, and my brother.

Q. Did he make any other attempts on you over there?

A. Yes, sir; he made an attempt on me with a rock while he was at home.

Q. What did he do then?

A. Well, he had a rock; he came at home one day with it and threw it at me, and I dodged it and got out of his way.

9c Witness further testified that his father had thrown a rock at him on another occasion and had made a number of "attempts on mother," and about a fortnight before the killing had threatened to kill the whole family; and that "he said if I ever came over to Farris's there he would blow my damned head off; I never would come back alive," and had told a Mr. Knapp "that he was going to get a gun and come back and blow my damned brains out;" that "most everybody around was telling me that he was making threats; that he said he intended to kill me at first sight. He told Mr. Knapp he intended to blow my damned brains out at first sight." (MS., pages 68–71.)

Witness further testified that he was the oldest boy at home; that his parents were divorced about three years. His testimony then proceeded as follows (MS., pages 72–3):

72 Q. Do you know of other threats that were made before he came to the house that day?

A. Yes, sir; he told people in Hot Springs that he intended——

The ASSISTANT DISTRICT ATTORNEY. You don't know anything about that.

Mr. J. WARREN REED (of counsel for defendant). Did you get that information?

A. Yes, sir.

Q. How did you get it?

A. He wrote up to my sister, and my sister told me——

The ASSISTANT DISTRICT ATTORNEY. Wait a moment.

The COURT. That is not competent.

The ASSISTANT DISTRICT ATTORNEY. The letter is the thing.

Mr. J. WARREN REED (of counsel for defendant). We have the letters.

The ASSISTANT DISTRICT ATTORNEY. Why didn't you produce them?

Mr. J. WARREN REED (of counsel for defendant). I have them over at my desk.

The ASSISTANT DISTRICT ATTORNEY. You had better produce them. They are not admissible, even, themselves.

Mr. J. WARREN REED (of counsel for defendant, to witness). That information came from Hot Springs?

The ASSISTANT DISTRICT ATTORNEY. The court has just passed on that.

The WITNESS. My sister told me——

The ASSISTANT DISTRICT ATTORNEY. Wait a moment. You need not answer that.

73 Mr. J. WARREN REED (of counsel for defendant). Did you get any information of threats that he made at Hot Springs direct from any person?

A. Yes, sir; my sister told me——

The ASSISTANT DISTRICT ATTORNEY. Wait a moment. That is not admissible. He says his sister got it from letters.

Mr. J. WARREN REED (of counsel for defendant). We have a witness here from Hot Springs that heard it.

The ASSISTANT DISTRICT ATTORNEY. If you prove it by that witness, you can then prove information.

Mr. J. WARREN REED (of counsel for defendant). Did you get information from witnesses, or from a witness who is here that was at Hot Springs at the time?

A. Yes, sir.

Q. Who was it?

A. Minor Perkins.

Q. What was that threat?

A. That he intended to come up in the Nation and kill every damned one of us, including me.

Q. What akin is Minor Perkins to you?

A. I am an uncle of his.

Q. How old is he?

A. He is 17 or 18, I forget now which.

Witness further testified, in his redirect examination that the family moved from the State of Washington because his father had shot at witness' brother-in-law and went to the penitentiary a year for it there.

O. H. Knapp, brother-in-law of defendant, testified that about 23 of the family came together to the Indian country; that William Allison came later, late in 1894, and located at John Farris's. Witness further testified as follows as to threats made by William Allison against defendant (MS., pages 95–99):

The WITNESS. The first he told me was after he was over to Mrs. Allison's. He came back from there the same day, and he told me—he came down in the field where I was working, and he told me to tell John Allison that he would blow his God-damned brains out the first time he seen him; told me to tell him he would kill his mother and the whole damned family. That is the way he spoke to me.

Mr. J. WARREN REED (of counsel for defendant). Where was he at at the time?

A. In the field where I was at work.

Q. What were you doing?

A. Plowing.

Q. Who was there?

A. Just I and him—Mr. Allison.

Q. Why did he do that? Just explain all about it. Tell it all.

The ASSISTANT DISTRICT ATTORNEY. Yes, tell all he said.

Mr. J. WARREN REED (of counsel for defendant). Tell it all; the whole business of it; why he said it, and all about it; how he came in the field, and explain it all.

A. That morning he told me that he was going over there.

Q. The morning of that day?

A. Yes, sir.

Q. You state he said he was going over there. Over where?

A. He called my mother-in-law "mother," and he said he was going over to mother's and see her and the children, and he said if they didn't let him in hell was going to pop, and when he came back he came down in the field where I was plowing, and he said "Hell is popping." I says, "What is the matter?" And he said, "I went over and they wouldn't let me in the house." I says, "You wouldn't get mad about that and talk about killing anybody." I says, "There is a way to get along without killing anybody." I says, "If you kill them you will only hang, and you had better take the law if they have done anything out of the way to you." He said he wanted to kill them and kill himself; he didn't want to live; he would kill the whole damned family and kill himself. He didn't have nothing to live for, he said.

Q. If he said anything about John, state that.

A. Yes, sir; he told me to tell John Allison that the first time he met him he would blow his God-damned brains out and kill the whole damned family. I thought I stated that once before.

Q. Was that all that occurred at that time?

A. He said a good deal. I can't remember all he did say. He just cursed and swore around there all the time until I drove off and left him. I left him cursing and swearing.

Q. Did you see him again?

A. Yes, sir.

Q. Tell us about that?

A. A few days afterwards he came down in the field and wanted to know if I had seen Johnnie Allison or any of them, and I told him I had. He says, "Did you tell him what I told you?" I told him I did. "Well," he says, "you can tell him I will blow his damned brains out the first time I see him if they don't let me go back and live with them." I told him I would. I was afraid of him. He had tried to kill me once before, shot at me, and I didn't want to have any trouble with him if I could help it. I had to work right close to where he was. I would do anything he asked me to to keep out of trouble with him. He came back in a few days afterwards; John had been in the field where I was plowing, and he wanted to know if I had seen him, and I told him he was out in the field where I was. He told me again that he was going to blow his damned brains out, and for me to tell him, and I told him.

Q. Just go on after that, all the interviews of that kind you may have had with him.

A. I saw him, then, the next day after Christmas, the 26th of December.

Q. Whereabouts? State all that he said.

A. At John Farrises, I went over there to take a little package over there that my mother-in-law give me to take to her that they had brought from Choteau, and I too' it over there, and I and Maje Farris was going rabbit hunting—that is, he asked me to go, the snow was pretty deep, and I didn't want to go, and Mrs. Farris said, "You had better go down with him and kill some rabbits," and so I told him I would go with him, and after we started out, got out on the porch, Maje Farris saw where there had been a rabbit close to the garden, and he said we would go out there and see if we could jump the rabbit out, and Mr. Allison was
98 talking to me and wanted to know what Johnnie and the old woman had to say, and I told him that he didn't have anything to say, only for him to stay away and not bother them, and they would not bother him. He says, "I will show the God-damned old bitch whether I will stay away or not." He says, "Tell them I will blow Johnnie's brains out, and kill the whole damned flock inside of two weeks. One of us has got to die in two weeks." I started off and left him, and caught up with Maje Farris after he left the house a little piece——

Mr. THOMAS H. BARNES (of counsel for defendant). Never mind your talk with Maje Farris. Go on with the threats that were made against the defendant.

Mr. J. WARREN REED (of counsel for defendant). No; don't state anything that Farris told you. Just state what Allison may have told you in regard to his son, the defendant.

A. That is all he said to me.

Q. State what he may have said to you in regard to arming himself there, or getting him a pistol, or anything of the kind. If he made a statement of that kind, state what it was and when it was.

A. Yes, sir; he said he was going to get a gun the same day that he came back from the house. The second time that I saw him he said he had the money to get one. When he came back again he said he had one; that he had bought him a pistol.

Q. The first time he said he was going to get one?

A. Yes, sir.

Q. And then he came back again and told you that he had one?

A. He told me he had the money to get one the next time, and the next time I seen him he came down in the field and said he had bought a pistol; that he had bought one, and he was going to blow his damned brains out the first time he met him.

Q. Did you communicate that to the defendant?

A. Yes, sir.

Q. You told him about it?

A. Yes, sir.

99 Q. You told him what he had said?

A. Yes, sir.

9f Witness further testified that deceased had a pistol in his pocket on New Year's Day, and had threatened him (witness) on that day; that it had been deceased's custom before coming to the Indian country to carry pistols more or less all the time; that he had threatened defendant to knock his brains out before he left the State of Washington.

Mrs. Ellen Turner, sister of defendant, gave similar testimony as to threats made when the family lived in the State of Washington and her father's habit of carrying arms; that the family emigrated on that account. She further testified as follows (MS., pages 109–111):

109 Q. When was the first you knew of him after you came to this country—the first you saw of him?

A. He came to my house there in Pryor Creek. I was sick at my mother's when he first came, and I got well, and I came home. I went home Friday, and he came there Saturday, and we were talking, and he was just the same as ever, with the intention to kill them all; and I would talk to him, and try to reason with him, for him to leave them alone, and not to go about them, and there would be no trouble. He said he was going over there. I told him not to go, for him to stay away, and listen to me; for him to listen to me for once. He had never listened to me, and for him to listen to me and there would never be any trouble. He said he was going over there, and if things didn't turn out just as he wanted them he would get a gun and kill them all.

Q. Now, state if he at any time made any threats against John, the defendant here, to you; and if so, state what they were.

A. When he came back the next week or so, or just about two weeks before the killing, he came back, and was there at my house, and Dora Thompson was there, and we were talking, and he got real mad in talking. I was trying to advise him to be good, and not to raise any

110 trouble or anything, and he got mad, and he said, "There is just one thing about it—I or Johnnie one has got to die inside of two weeks." When he said that he went outside. Pretty soon he came back, and set down, and got to talking again, and he was swearing and cursing around a good deal, and I was kind of afraid of him myself. He got mad at me, and he drew a stick, and he would have hit me if Dora Thompson had not been in the house, I suppose. He drew the stick up and looked at me as if he would use it if she was not there, and laid the stick down again. And he came back again, and he said, "There is just one thing about it, and you can tell Johnnie so, too." He says,

"Johnnie or I one have got to die inside of two weeks;" and he said, "I have got a pistol, and I will use it." And as he said that he threw his hand right around to his right hip pocket; and as he said that and did that I saw the glimpse of it, and he went out.

Q. How long was that before the killing?

A. Just about two weeks.

Q. Do you know anything about his having gone over to where Johnnie lived at your mother's?

A. He told me that day——

Q. Was this conversation before or after that?

A. It was afterwards. He just told me that day that he had been over there and that was what he was mad about. He was mad at mother and Johnnie and them.

Q. He had been over there?

A. Yes, sir.

Q. You say that is the way he talked there that day?

A. Yes, sir.

Q. You say Dora Thompson was there?

A. She was there when he first came in the house and began to talk, and said that Johnnie or him had to die inside of two weeks, and he went out and when he came back she wasn't in there?

Q. She was in there at the first conversation?

A. Yes, sir.

Q. Is she here as a witness?

A. Yes, sir.

Q. Now, state if you know of any other threats that he made after that against Johnnie here.

111 A. He came there just a day or two after that, I think it was, and he came to the door, and he said he wanted to see me a few minutes, and I went outside of the door there, and he commenced talking about the folks again, and I tried to quiet him, as I always did, and he says, "Well," he says, "you can tell them that Johnnie or I has got to die inside of two weeks." He says, "There is one thing about it; I will watch my chance, and whenever they come over to town I will get them, and I will make them get down on their knees and beg for mercy, and while they are begging for mercy I will blow their brains out," is the very words that he used.

Q. That was afterwards?

A. Yes, sir; that is the last time I saw him.

Q. That is after the time that Miss Dora Thompson was there?

A. Yes, sir; he said he would lay out and do like a man in California did, and when they come along he would get them.

9f On cross-examination she testified in part as follows (MS., pages 111, 113):

111 Q. What had you done to the old man that made him want to kill you all that way?

A. There had been nothing done that I know of. Nothing only his temper.

* * * * * * *

113 Q. When the old man went to the penitentiary, you swept everything that he had labored for and took it out of that country, did't you?

A. No, sir.
Q. You didn't?
A. The place was divided up, and he had his part, and sold it and put the money in his pocket.
Q. How much did he get?
A. He got fifteen acres, what he asked for, and a cow.
Q. How much of that did you all get when he was sent to the penitentiary?
A. Didn't get none of it at all.
Q. What other wrong did you do him in that country?
A. I never done him none.
Q Then why was he so mad at you?
A. Just his nature.
Q. He wasn't insane, was he?
A. No, sir; he was not.
Q. Perfectly sane?
A. Yes, sir.

9f Dora Thompson testified in support of Mrs. Turner as to threats.

Minor Perkins, nephew of defendant, 17 years old, testified as to threats of deceased made at Hot Springs, Ark., against the lives of members of the family and as to his buying arms to kill the family with.

9g Jasper Allison, brother of defendant, 20 years old (MS., page 138), testified as follows concerning the shooting (MS., page 123):
123 Q. What attracted your attention first to the shooting, if you saw any part of it, if you saw any of it or heard any of it?
A. I was standing up on the wagon and I heard the first shot fired, and I looked up and I saw John standing about four feet from the barn, and he shot the last two shots standing still. John Farris said he thought it was somebody shooting at a mad dog. He said he never recognized who shot, or nothing; never thought anything about it; never knew it until the shooting was over, and he recognized Johnnie, and he just thought it was somebody shooting at a mad dog. He recognized Johnnie. I went down to the barn and saw Johnnie, and I came back——
Q. Where did you see him?
A. I saw Johnnie down at the barn. He was on his horse.
Q. What place at the barn?
A. He was at the west corner.
Q. Did you talk to him?
A. I spoke about two words to him. I said good morning, and asked him where my mother was, and he said she was over at my aunt's.

9g He also testified as to threats against defendant's life in the State of Washington, and that deceased once shot at Mr. Knapp and the witness there, and was "sent to the penitentiary for a year, and at the time he was taken to jail he said he would do better shooting next time and kill the whole damned outfit."

Minor Allison, brother of defendant, 16 years old, testified as follows (MS., pages 128–9):

128 Q. Were you at home on the day your father came there, some time before he was killed?

A. Yes, sir; I was.

Q. Just state what occurred there that day.

A. Johnnie, my brother, was out plowing, and he seen Cart Crowder and father coming in a wagon, and he came in the house and told me to go out and get the plow for him, that Cart Crowder come for the plow; and just as I went out of the door the' stopped at the plow and father got out of the wagon and started towards the house, and went under a wire fence about 25 yards of the house, and he was right by the wire fence, and he said he was coming in the house, and I spoke to

129 him. I says, "Pa, don't you go in." He said, "By God, I will;" and I just went on out to the plow and left him and let him go on, and he started on in, and as I got out to the plow Johnnie came out and pa was there, and he said he wanted to see the children, and Johnnie told him that there wasn't anyone at home but Albert. He said he wanted to see mother then. Johnnie holloed to mother and asked if she wanted to see him, and she said no when she come to the door; to make him stay out; that she was afraid of him.

Q. What were you doing?

A. I was helping Mr. Crowder get the plow and put it in the wagon at that time. And he stood there and cussed Johnnie; wanted Johnnie to come out of the fence and he would fight him, and Johnnie told him that he didn't want to have any trouble with him, didn't want to fight him; and by that time Cart Crowder and I had the plow in the wagon, and he drove around down below him and holloed at him to come on, and he holloed three times at him, and the last time he told him if he didn't come on he would go off and leave him, and he got about halfway between the wagon and where we were standing, and he said to Johnnie, "If you ever come over to Farrises you will never get back. I will go and get a gun and come back and kill every God-damned one of you before to-morrow night."

Q. Was that about all that occurred?

A. Yes, sir; that is about al' that occurred there.

Q. Did Johnnie have his gun?

A. Yes, sir.

9g He also testified as to threats in the State of Washington.

Albert Allison, brother of defendant, 13 years old, testified as follows (MS. pages 131–2):

131 Q. State if you heard your father, William Allison, make any threats against John in his lifetime?

A. I and Johnnie were plowing, and Johnnie was holding the plow, and I was driving for him, and father came over there with Cart Crowder in a wagon.

Q. When was that?

A. When he first came up to the house there.

Q. At what place?

A. At my mother's.

Q. Was that in the Indian country?

A. Yes, sir; and Johnnie says, "There comes father after the plow:" and we went to the house there, and father got out of the wagon and started towards the house, and he said he would come in, and just as he came under the wire fence Johnnie came out of the door and told him to get out of there, and he went out, and he wanted Johnnie to come outside and fight him, and Johnnie told him that he didn't want to get in trouble with him; all he asked for him was to keep away from there; and he said he would go off and get a gun and kill every damned one of us before to-morrow night.

Q. What else occurred there, if anything?

A. I don't know of anything else that occurred there.

Q. Did you hear him make any threats against John?

A. I went over to John Farris's after a horse collar, and father came down there, and he spoke to me, and I spoke to him, and said he
132 was going over to the house, and I said for him not to go over there; that mother said for him not to come over there; and he said he was going over there, and I told him they wouldn't let him go in if he went over there; and he said he would get a gun and kill every damned one of them if they didn't let him go over there.

Q. When was that?

A. That was the day that Knapp sent me over there after a horse collar.

Q. How long was that before he was killed?

A. About two weeks.

Q. About two weeks before he was killed?

A. Yes, sir.

Q. Was that before that he came over to the house there and wanted to come in or afterwards?

A. Before he came over to the house.

Q. Did your brother John know what he had said?

A. No, sir.

Q. Did you tell that at home?

A. Yes, sir.

Q. John was living at home with you?

A. Yes, sir.

Q. You lived there together?

A. Yes, sir.

The ASSISTANT DISTRICT ATTORNEY. You never told John?

The WITNESS. Yes, sir; I did. And my father and Farris was talking, and he said if he had some giant powder he would go over to the house and blow the house up, and Maje Farris said, "There is some giant powder laying on the stand," and he took it and hid it to keep him from going over there to blow the house up.

Mr. J. WARREN REED (of counsel for defendant). Was that when you were there?

A. No, sir; I heard Maje tell that.

Q. You don't know that yourself? You could not tell that?

The ASSISTANT DISTRICT ATTORNEY. It is about like the other. Let it go.

9g Robert Allison, brother of defendant, 25 years old, testified as to threats in the State of Washington.

Margaret Allison, mother of defendant and widow of deceased, testified as to threats and acts of violence in the State of Washington, and that the family emigrated on that account; and further testifies as follows (MS., pages 143–5):

143 Q. Do you know of any threats against the defendant that he made after he came to this country?

A. Yes, sir. The day that he came there to the house——

Q. Just state what occurred that day?

A. My son was out plowing, I guess 25 or 30 yards from the house, on the south side of the house——

144 Q. Which son?

A. John Allison.

Q. This defendant?

A. Yes, sir. And when he saw his father coming with Mr. Crowder, he knew that Mr. Crowder was coming after John Farris's plow. He had his plow plowing with it. And so he just came in the house. I was so afraid I wanted one or the other of them by my side. They came in and I sent my son Minor out to go and help Mr. Crowder with the plow in the wagon, and Johnnie was in the house, and I saw Mr. Allison get out of the wagon and start right for the house, and I says, "Johnnie, don't let him come in," and so when the old gentleman (Mr. Allison) got inside of the yard, he came right in under the wire fence, my son stepped out of the house, and he says, "Get out of here, pa." He says, "I am not going to do it." He says, "I want to see the children." Johnnie says, "The children is not here; only Albert." He says, "I have seen him, but I want to see the others." He said they wasn't there; they wasn't at home. He said then he wanted to see the old woman, and Johnnie says to me, "Do you want to see him?" And I says, "No, I don't want to see him," and he told him to get out three times before he got out, and when he got outside he dared him to come out; that he would fight him outside, and Johnnie said, "I don't want any trouble with you; just all I want is for you to stay away from here," and the old man said, "God damn you, I will go off and get a gun and come back and kill the last damned one of you."

Q. Did Johnnie make any attempt to shoot him?

A. No, sir; he did not make any attempt that I saw to shoot him.

Q. You say he had the gun in his hand?

A. Yes, sir. He just told him three times to get out. And he told him he didn't want to have any trouble with him.

Q. Do you know of any threats that were conveyed to John, the defendant, before this killing, before that day?

A. Yes, sir; I was over to Pryor Creek to my daughter's one day; me and him went over there to do trading—that is where we

145 traded—and when we were there awhile——

Q. You need not give the particulars.

A. Dora Thompson and my daughter both told us about Mr. Allison's threat to kill Johnnie; that one or the other of them would have to die inside of 2 weeks. I heard them tell Johnnie that.

9h The following colloquy also occurred during her direct examination (MS., pages 145–6):

145 Mr. J. WARREN REED (of counsel for defendant). Did you bring some letters here?

A. Yes, sir; and turned them over to you.

Q. Do you remember how many?

A. I think there were three or four of them—four of them, I think.

Q. Do you know what has become of them?

A. No, sir; I turned them over to you.

Q. Do you know if I have searched for them?

A. Well, yes; you have been looking for them there at your office.

The ASSISTANT DISTRICT ATTORNEY. How could she know except what you told her?

Mr. J. WARREN REED (of counsel for defendant). She was

146 there and saw it.

The ASSISTANT DISTRICT ATTORNEY. You stated here yesterday afternoon you had the letters, and had them in your possession.

Mr. J. WARREN REED (of counsel for defendant). I went over to hunt them, and I have got the envelope they were in.

The ASSISTANT DISTRICT ATTORNEY. That is what you stated in open court, that you had the letters, yesterday afternoon.

The WITNESS (to Mr. Reed). I turned them over to you last February.

The ASSISTANT DISTRICT ATTORNEY. The point is, if the court please, the gentleman is trying to prove by this witness what search he has made for these letters.

Mr. J. WARREN REED (of counsel for defendant). She was there in the office when I searched.

The COURT. That you could not prove.

9h On her cross-examination the following occurred (MS., page 147):

147 Q. Haven't you tried to get your sons, one after the other, to kill him?

A. No, sir.

Q. Haven't you said that this was the only son that had the grit to kill him?

A. No, sir.

Mr. THOMAS H. BARNES (of counsel for defendant). State when and where, and prove it.

The ASSISTANT DISTRICT ATTORNEY. You deny that, do you?

A. Yes, sir; I deny all such reports as that.

Mr. THOMAS H. BARNES (of counsel for defendant). We object to that sort of questioning without stating the time and place. It is improper. We except to that question.

The ASSISTANT DISTRICT ATTORNEY. You can stand aside.

The COURT. Yes.

The ASSISTANT DISTRICT ATTORNEY. How old is your son?

A. He will be 21 the fifteenth of next October.

9h J. D. Hall testified that he heard the shooting; that the three shots were "fired in rapid succession. All fired just about as close as a man could shoot a Winchester."

Doug Binns, Frank Rucker, and Robert Allison (recalled) gave testimony of no present materiality.

J. Warren Reed, one of defendant's counsel, testified in part as follows (MS., pages 172–5):

172 Q. I want to ask you about another matter. Did Mrs. Allison deliver to you any letters?

173 A. Yes, sir; at the February term of court, when she was here, she brought some letters to me; she brought a whole lot of letters.

Q. What letters were they?

A. They were letters that were written by people there in Washington Territory to her and members of the family regarding these affairs.

Q. Were there any letters among those letters direct from the deceased, William Allison?

A. There was a letter that purported——

The ASSISTANT DISTRICT ATTORNEY. Wait a moment. The letter itself—there is no proof that his handwriting was signed to it, or that his signature was to it.

Mr. THOMAS H. BARNES (of counsel for defendant). We haven't got to that part of it yet. I asked him if it purported to be from him.

The COURT. That would not make it competent.

Mr. THOMAS H. BARNES (of counsel for defendant). What became of those letters?

A. I put them in the envelope that they came in—that is, that she had them in here—a large envelope, and seemed to have been addressed to Margaret Allison, and came from Washington.

Q. Was there anything else with the letters; any affidavits or anything of that sort?

A. Yes, sir; when they came here they brought a whole lot of affidavits that was used in the court.

Q. Did you put them al' together, or did you have them separated? How were they?

A. These letters I put in this envelope.

Q. Is that the last you remember of them?

A. Yes, sir. I put them in this envelope and I put them in my drawer to my desk. I never lock my office day or night or any other time. It stands open. I put them in the drawer at the bottom at the left, where I sit at my desk. I just put them in there.

Q. She brought all these papers and delivered them to you?

A. Yes, sir.

174 Q. Did you look through them?

A. I examined them and read them to see what they were, to see what papers they were, to see whether they were of any use to us or not. The most of them were letters from different people over there to members of her family. Of course, they would not be competent, I suppose. There was only one letter that purported to be from Allison.

Q. Now, then, have you searched for these letters since this case commenced?

A. Yes, sir; I got permission of the court yesterday and went over and went through my drawers, and I found the envelope that I had had them in, the envelope addressed to her, but I can't find the letters.

Q. Did you find the letter that purported to be from Allison?
A. No, sir.
Q. Or did you find those other letters?
A. I found two other letters there.
Q. But not from him?
A. No, sir; not from him.
Q. Now, don't give the contents of it, but I want to bring up this point: Did you read the letter that purported to be from him to his wife while in your possession?
A. Yes, sir; I read it when it was first brought here.
Q. Have you searched thoroughly for those letters?
A. I have. I went through all my office for it.
Q. Can you state whether or not they are in your office, or whether they are lost?
A. They are not in my office that I can find at all, for I have searched twice for them.
Q. You left the court room yesterday and searched for them?
A. Yes, sir.
Q. Then when you made the statement before the jury you supposed you had them in your possession and at your office?
A. Yes, sir; I supposed nothing else.

175 The ASSISTANT DISTRICT ATTORNEY. He has sense enough to answer the questions without being led.

Mr. THOMAS H. BARNES (of counsel for defendant). I want to ask him for the contents of the letter that purported to be from William Allison.

The COURT. I don't think, in the first place, that he has proved the loss of the letter—proved that he has made diligent search. Here is an attorney for the defense who has shown the extraordinary diligence of getting evidence that belonged to the Government and keeping it in his possession, and I think his statement does not show he has made sufficient search to prove the loss of the letter. You will have to make more diligent seach than that.

Mr. THOMAS H. BARNES (of counsel for defendant). On that part of it he says that the letter came in his possession, and I know that he left the court room for the purpose of searching for it; whether that is sufficient or not——

The COURT. In case of a lost letter the proof should be strict—as to the handwriting, I mean.

Mr. THOMAS H. BARNES (of counsel for defendant). Suppose that handwriting is gone and he has read it?

The COURT. It does not make any difference. You have to identify the letter first as coming from him, and that it was in his handwriting, and that it is lost. You will have to show more diligence than you have from this testimony.

Mr. THOMAS H. BARNES (of counsel for defendant). We save an exception to the ruling of the court on that.

The COURT. Yes.

Mr. THOMAS H. BARNES (of counsel for defendant). However, we will make thorough search.

9h On recross-examination he testified as follows (MS., page 176):
176 You say you left the court room and searched for those letters yesterday?

A. Yes, sir.

Q. What time did you do that?

A. I don't remember. I called the attention of the court to it.

Q. We were trying the case all the time. You were here all the time. What time did you leave?

A. I could not give you the minute. I called the attention of the court, and asked to go and look for them. I think it was when you were cross-examining the defendant, as well as I remember.

Q. Do you know how long I cross-examined him?

A. No.

Q. Can you give any idea of the time you left here to search for those letters?

A. You can give as good an idea as I can. I don't remember the hour we were in that part of the business.

Q. You stated here late yesterday afternoon that you had the letter in your possession, didn't you?

A. Not after that I did n't.

Q. After you had examined the defendant, and after the defendant had left the stand, and after you were examining some of the other witnesses a long time after that, didn't you state right there in your chair that you had the letters in your possession?

A. I don't remember that I stated that. If I did I was mistaken, because I didn't have them.

Q. Well, everybody heard you. Stand aside.

A. I had two that I spoke of that I did find.

9h And on redirect examination, as follows (MS., pages 176–7):
176 Q. You left in the evening, you say?

A. Yes, sir.

177 Q. And searched for them?

A. Yes, sir; I also searched for them after the adjourning of the court, and last night.

Q. You will have to search again.

9h S. Cope Blake, a neighbor, testified as follows (MS., pages 178–9):
178 Q. State if you heard William Allison make any threats against the life of the defendant here previous to his death, and where it was, and state what he said?

A. On New Year's Day. New Year's night I staid all night at Mrs. Farris's, where Allison was staying, and after supper he commenced talking to me about his life, about his troubles, and went on to say that he had been out to see his wife—went out to see his wife, and Johnnie Allison had stopped him with a gun, throwed a gun on him, and he said if he had had a gun there, he said, he would have had chicken for dinner,
179 meaning he would have killed Johnnie. And he said he would kill the whole outfit. He said there wasn't but one way to stop it, and *they* would be for them to send Johnnie there and for him to whip Johnnie until the blood run down to his heels, or something like that——

The ASSISTANT DISTRICT ATTORNEY. How is that?

The WITNESS. He said there wasn't but one way to stop it, and that was for them to send Johnnie there and let him whip Johnnie until the blood run down to his heels for doing him that way.

Mr. J. WARREN REED (of counsel for defendant). What else did he say? Did you say anything to him, or did he make any other remarks about it?

A. Yes, sir; we talked there until about 11 o'clock, I reckon, maybe twelve; it was late; and the rest had all gone to bed but him and I, and he said he would never mind; he said he would get them when the weather got warm, so he could lay out at nights. He said he would kill the whole damned outfit.

Q. What else did he say?

A. He said he only shot at Knapp back in Washington. They said he shot at Jasper, but he said he never shot at Jasper. He would have killed Knapp if Turner hadn't turned and knocked the pistol up; he said he would have killed Knapp if it had not been for that. He said they told lies on him about that.

Q. Did he say anything further about John? Make any further threats about John?

A. Yes, sir; he said Johnnie had been seen there at the barn with a gun, and he said he was laying around there to kill him, and he said if ever he caught him there he would beat his damned head off with a club. He then talked a little while, and he said he would shoot his damned brains out if he ever caught him there.

9h On cross-examination he testified as follows (MS., pages 180–1):

180 Q. The old man said that Johnnie had been seen about the barn there?

A. Yes, sir.

Q. Waylaying the old man?

A. That is what he said; that he had been seen about the barn there.

Q. With a Winchester?

A. Yes, sir.

Q. That he was there for the purpose of shooting the old man?

A. That is just the way that he said it, that he had been seen there.

Q. And he told you that John had drawn a gun on him over at their mother's?

A. Yes, sir.

Q. What else did he say? He told you all about his troubles, did he?

A. Yes, sir; he told a whole lot about it. I don't know

181 whether he told all of it or not—everything about it.

Q. He told you they took everything away from him, and then left Washington, didn't he?

A. No, sir; he said they left him ten acres of land.

Q. Didn't he tell you they had wronged him, also?

A. Yes, sir.

Q. And that they had sworn lies on him and sent him to the penitentiary?

A. I don't think he ever said that.

Q. You said a moment ago that he said that very thing; that they had sworn lies on him about shooting at Jasper.

A. Yes, sir; he said that.

Q. He claimed that they had sent him to the pen., didn't he?

A. Yes, sir; I think so.

9i Minor Perkins, recalled, gave testimony of no present materiality.

9i E. C. Alberty, prosecuting attorney at Claremore, testified that a week or two before the killing defendant and his mother had made an affidavit to get a peace warrant for William Allison. He testified as follows on cross-examination (MS., pages 188–9):

188 Q. Had you a short time before that had a conversation with John Allison, the defendant, about the difficulty with his father?

189 A. I had.

Q. I wish you would state what he said to you.

A. He came to me and wanted permission to carry his gun, and I told him that I could not give him permission; it was beyond my authority; and he went on to say that the old man threatened his life, and he thought he was in danger, and I told him I could not give him any authority to carry the gun; and then he asked me if he did kill the old man what would be done with him, and I told him if the old man came to his house and raised a racket and tried to carry out his threats that he told me he had made on him, I told him he would be justified in doing it. I told him not to go hunting the old man up, though, and trying to kill him. I says, "You will get into it if you do."

Q. Was that all?

A. No; and then John says "I will not bother him. If he will let me alone, I will let him alone."

Q. How long before the killing was that?

A. That was five or six days before the killing.

Q. Was the inquiry he made of you if he, John, had the right to kill the old man on account of threats that he had made?

A. Yes, sir; he did ask me that question, and I told him he did not have.

Q. Did he say that he had the right to kill him because of threats?

A. No, sir; he did not say anything about that.

Q. Did he say anything about his father having been over to his mother's? Was it after that?

A. It was after this that he came to me and had this talk.

Q. He came to you and made that affidavit?

A. Yes, sir; he came and made that affidavit the next day after the old man was over to his house.

9i Margaret Allison, recalled, testified as follows (MS. pages 190–2):

190 Question. Were you acquainted with your husband's handwriting in his lifetime?

Answer. Yes, sir.

Q. I will ask you if at any time before this trial you delivered to Mr. Reed any letter from him in his handwriting, that you knew to be in his handwriting?

A. Yes, sir; I turned him over a letter last February, the 7th or 8th, somewhere along there, I don't remember the date exactly.

Q. Did you deliver him any other letters at the same time?

A. Yes, sir; I delivered him three other letters from friends of mine, but this letter was direct from my husband just a few days before he had been sent to the penitentiary. He had already been sentenced, but he had not been sent off.

The ASSISTANT DISTRICT ATTORNEY. I do not see any use to go into any other letters.

Mr. THOMAS H. BARNES (of counsel for defendant). It is to show the circumstance that she delivered them to Mr. Reed, and this letter in question was among them. (To the witness). What did he do with the letters? Where did he put them?

A. They were in his left-hand drawer. I delivered them to him and he put them in his drawer, and I had also seen the letter afterwards, and we talked about it. We took it out, and we were reading it there, I saw him put it back.

Q. You saw him put the letter?

A. Yes, sir.

Q. Where did he put it?

A. In the left-hand drawer of his desk.

Q. Where; what building; his office?

A. Yes, sir; in his office.

191 Mr. THOMAS H. BARNES (of counsel for defendant). Now I offer to prove the contents of that letter.

The COURT. I don't think you have proved the loss of it. The court is not satisfied with proof sufficient to show the loss. An attorney in this case who exhibits the care that he did with other items of evidence, and comes in here, and without making any further showing, and sets up the loss of a letter that does not satisfy the court that the letter is lost, or that the proper effort has been made to find it if it is lost.

Mr. THOMAS H. BARNES (of counsel for defendant). Of course, the matter is in the discretion of the court, but my understanding is——

The COURT. If you haven't any other diligence to offer upon that point the court will not permit the contents of the letter to go in, because it is a very convenient way of hiding away letters and getting at the contents of them, or the pretended contents of them. The very purpose of the law requires the rule to be strictly applied, especially when the letter is an important item and of sufficient importance to be placed in the hands of counsel, and the counsel would right away go and lose it; lose it out of his office. It does not look well on its face. It looks suspicious.

Mr. THOMAS H. BARNES (of counsel for defendant). I will ask you if you were with Mr. Reed to-day since court adjourned, and made any search for this letter?

A. Yes, sir; I was there to-day. Me and my daughter were there, too, and we searched all over his papers and letters, around his desk, and things, and shelves there. Mrs. Reed also was there searching.

Mr. THOMAS H. BARNES (of counsel for defendant). I want to save the point, and I will simply state now, to let the record show, that what I have offered to prove by this witness is the contents of the letter; that she knows the handwriting of her husband, and that we have

192 made proof in regard to the search for it.

The COURT. Yes.

Mr. THOMAS H. BARNES (of counsel for defendant). And save an exception to the ruling of the court?

The COURT. Yes.

Mr. THOMAS H. BARNES (of counsel for defendant). Of course, it was in regard to threats, and in this connection I state what the letter was. Of course, I have to refer to it in some way so as to identify it as that.

The COURT. That is getting at the contents in an indirect way.

Mr. THOMAS H. BARNES (of counsel for defendant). The law says we have a right to give a sufficient description to designate what the matter is.

The COURT. You need not give it in the presence of the jury. That is only another way of getting it before the jury.

Cart Crowder, a neighbor, testified in rebuttal as follows (MS., pages 194–5):

Q. Did you go with John Allison to the home of Mrs. Allison some time before the death of William Allison?

A. I went with William Allison.

Q. Why did you go?

A. Mr. Farris sent me after a breaking plow.

Q. Who went with you?

A. Mr. Allison.

Q. William Allison?

A. Yes, sir.

Q. Tell what occurred when you got to where Mrs. Allison lived?

A. Well, we drove up on the south side of the place——

Q. How is that?

A. A little lot that was fenced around the house, and they were breaking on the south side of this little lot outside. I don't think it was fenced then. Mr. Allison got out when we got up to where the plow was and went through the fence, and just as he got through the fence Johnnie came out with a gun and pulled it down on him; and I says, "Johnnie, don't shoot," and he said, "If he comes inside here I will kill him;" and I called the old man uncle, and I says, "Uncle, come out," and the old man came outside, and Johnnie put the gun down, and I got over on the other side of the wagon and got the plow loose from the horses—they had their team hitched to it—and as soon as I got the plow in the wagon I got the old man in and drove off in a trot.

Q. Was the old man armed?

A. No, sir.

Q. Did Johnnie draw his gun on the old man more than once?

A. They were quarreling while I was on the south side of the wagon, and when I raised up and looked over the wagon he had drawn the gun down on him the second time. I told him, "Johnnie, don't shoot, and I will take him away," and he put the gun down again.

Q. Was the old man armed in any way?

A. No, sir; he was not armed.

Q. What did he say, if anything? What did the old man say, and what did John say?

A. When he first went up there he said, "Johnnie, I want to see the children and speak to mother;" and Johnnie says, "The children is not here, and you can't go to the house."

Q. Was there anything else said?
A. By Mr. Allison, or Johnnie?
Q. Yes.
A. I don't remember that there was.
96 On cross-examination he testified as follows (MS., pages 196–7):
196 Q. Did you try to keep the old man from going over there that day?
A. No, sir.
Q. Did you tell Minor Allison that you did while you were loading that plow in the wagon there?
A. No, sir; I did not.
Q. You didn't tell him anything of that sort?
A. No, sir.
Q. Did you tell him that you hid the cartridges to keep him from getting them?
A. No, sir; I did not.
Q. Did he work there?
A. Yes, sir.
Q. Did the old man pull his vest open and tell him to shoot?
A. Yes, sir.
Q. Why didn't you tell that awhile ago?
A. I didn't think about it.
Q. Threw his breast open and told him to shoot?
A. Yes, sir.
Q. He dared him to shoot, did he?
A. I don't remember that he did.
Q. Pulled it open this way and told him to shoot?
A. He pulled his coat open and told him to shoot.
Q. He didn't, did he?
197 A. No, sir; he didn't shoot. I told him not to.
Q. You were not holding him?
A. No, sir; I was not holding him.
Q. How close were you to him?
A. Probably I was 30 yards from him.
Q. Wasn't he cursing and carrying on there a great deal?
A. They was cursing some.
Q. The old man?
A. Yes, sir; he cursed some.
Q. What did he say?
A. I don't know what either one of them said in that fracas, I told you.
Q. Then he did pull his breast open here, and did curse and carry on some?
A. Yes, sir; that was the way of it.
Q. How long were you there about the house?
A. I could not say exactly; I don't suppose we were there over three minutes.
Q. Did you hear John call his mother to know if his father could come in there?
A. No, sir; they were all talking there.
Q. You don't know whether that was said or not?
A. No, sir; I was over on the other side of the wagon.

9i John P. Dallas and John Farris, in rebuttal, gave testimony of no present materiality.

9i Robert Isley, in rebuttal, testified as follows (MS., pages 200–1):
200 Q. Did you have a conversation with this defendant, John Allison, in regard to killing his father some time before the killing there at the barn?

A. Yes, sir.

Mr. THOMAS H. BARNES (of counsel for defendant). Was he asked about it yesterday?

The ASSISTANT DISTRICT ATTORNEY. I asked him and he denied it all—that is, the defendant. I never asked this witness before. (To the witness.) State what that conversation was. When was it, first?

A. I don't know just what day of the month it was.

Q. How long before the killing?

A. It was about a week or ten days or such a matter.

Q. State what he said.

A. He was there at the barn, when I and Mr. Crowder drove up, feeding the cattle, and I asked him what he was doing, and he said he stopped there to warm, and then I and him were standing there talking, and Mr. Crowder went around and unhitched the team, and I asked him why he didn't go up to the house and warm, and he said he didn't want to go up there, that he was afraid him and his father would have some trouble, and I says, "No, I guess not." I says, "He ain't going
201 to hurt you." And he said yes, he was afraid he would; and then he said he was going to kill him just as quick as he caught him away from the house. That is what it was.

203 This was all the testimony on either side. Whereupon, after argument by counsel, the court charged the jury orally as to the law of the case, which charge was taken at the time by the court stenographer, and was as follows:

204 *Charge of the court.*

Delivered May 27, 1895.

PARKER, *J.*:

Gentlemen, the defendant is charged with the crime of murder, for having on the 5th of January, 1895, in the Cherokee Nation, willfully, and with malice aforethought, taken the life of William Allison by shooting him with a gun. That is the charge that is preferred against the defendant. There are but two general propositions in the charge made against him. The first one is, Was the crime committed? and, secondly, Was it committed by the defendant? To ascertain if the crime has been committed, there are certain things necessary to be found. First, you are required to find from this testimony that William Allison is dead. That is the very starting point in the investigation. As we go over these propositions that enter into the general proposition showing that a crime has been committed, you will let your minds revert to the testimony, to enable you to see whether the propositions exist, whether they have been proven. Now, ask the evidence whether or not William Allison is dead.

If the evidence answers you in the affirmative, you may lay that proposition aside as established; of course provided it is established as all these
205 propositions must be established, beyond a reasonable doubt. Secondly, that he died because he was shot with a gun; in other words, a gunshot wound or wounds took his life—caused his death. You treat that proposition the same as you treat the other one. Go to the evidence and see what the testimony shows. See what is proven in that respect. Now, varying the order of the propositions, you may next consider in this connection whether or not the deceased, William Allison, was shot by the defendant, John Allison. That is another proposition that enters into the general one that I have enunciated. And as that is not disputed, I have placed it in the order I have given it to you. If you find that one to exist, lay it aside with the others. The next proposition, which pertains to the characterisation of the killing, which goes to show whether it was a crime or not, is, Was the killing willfully and with malice aforethought? If it was, there is but one conclusion that can be reached in the case, and that is that such killing is murder. Now, of course, on these propositions we are not left to our own conceptions of what a willful act is or what a killing with malice aforethought is. The law defines these expressions. It tells us that there is a peculiar or legal meaning attached to them—a meaning that the law attaches to the act as done. It makes it necessary in this connection that we should stop here for the purpose of defining these expressions; that is, give you the legal meaning of them, defining first the word "willfully" and secondly the phrase "malice aforethought." Now, "willfully" means intentionally, and it is not a difficult thing to be found when a killing has been done with a Winchester gun, because you will bear in mind that although you are required to find this mental condition, you can only find it by acts, you can only have it proven to you circumstantially, for the reason that it is not in the power of man to get information of a mental condition by positive evidence. You may
206 have positive evidence of other occurrences, and you may reason from that to ascertain whether the proposition you are seeking to find is established by these things which become circumstances when applied to that proposition. For instance, you have a statement of a witness as to the shooting with a Winchester gun. Now, there are facts in connection with that that come within your common observation; they do not come to you by proof. You go into the jury box and you take your common knowledge and your common information with you, and you bring it to bear right here on a proposition of this kind—your knowledge of the character of a gun. You know it is deadly. You know it is made for the purpose of taking animal life—destroying animal life. That is the purpose of it. But it will not do that alone. It can not do it alone. It is not automatic as a death-dealing weapon at all. It is not self-acting. It has to be acted upon. That is a matter within your common knowledge. Therefore you apply it, and whenever the proof shows that one man—in this case shows that the defendant, John Allison, presented at his father, William Allison, the deceased, the Winchester gun and fired it, and fired it twice again at him, into his head and body, you have before you a set of facts which shows that the defendant acted upon that gun, knowing that it could not act of itself; the fact that it was presented, showing the exercise of will power; the fact that the

trigger was pulled, again showing the exercise of will power. Then, in order to ascertain whether a thing is done willfully or not you take the manner in which it was done, and as sensible men you are authorized by the rules of logic and of law to take the manner of executing the act as evidence of the character of the act. Now, to illustrate that a little more forcibly: You see a man present a gun at another, and he fires it, and the man falls, or is in the act of falling, and he fires it again and again. If you see that you have ocular proof of it, you are satisfied that he intends to kill the party because you judge from
207 the kind of act he does that he is acting willfully and intentionally, and you see the very result produced that is the legitimate and probable result that will be produced by an act of that character, and therefore, naturally, you conclude, if you see a thing of that kind, that the party intended to kill the one he is firing at. That is exactly the conclusion you come to. Now, you are authorized to come to the same conclusion when these facts are seen by other witnesses and are produced before you by the light of the testimony of these other witnesses. Hence you see it becomes an easy matter to find whether the thing was done intentionally or not, bearing in mind that "intentionally" means "willfully" and "willfully" means "intentionally." And you are to remember further, that if an act of the kind such as is charged in this indictment, the act resulting in the death of William Allison, was done intentionally, and consequently willfully, the law says that the death is a willful death upon the part of this defendant, because he, like all other persons, in the interest of the protection of life, especially in the interest of the protection of life, is held to have intended that which is the natural, reasonable, and probable consequences of what he does. Therefore, if a man presents a gun at another within shooting distance of him and fires it at him the law says that you as rational men, acting rationally, acting reasonably, must come to the conclusion that he intended to kill him, because all men are presumed to intend the consequences which flow naturally and reasonably from the willful acts done by them—the intentional acts; and if you find that state of case here, if you find that the proof shows here that the defendant presented the Winchester gun at his father and fired it at him, first shooting him in the body and then in the head, you are authorized from that state of facts to find that he intended to kill him. If he intended to kill him the law says that he willfully killed him if that
208 result was produced. Now, that is what is meant by "willfully" as used in this connection. It is used in contradistinction to an accident. It is directly opposed to an accident. A man might take life with a gun and be innocent of any killing that could be attributed to him as a willful killing, but that means a state of case where he is exercising the amount of care that the law exacts of him, and that care, of course, differs in different cases. It depends in each case upon the circumstances of the case. It depends upon the character of the weapon, and the likelihood that the reckless use of it would take life, would produce death. The law lays it down as an axiom that when you handle firearms that you are required to exercise the highest degree of care that you can exercise. That is what the law contemplates a reasonable man does, and therefore it is called reasonable care, and outside of that all cases are willful cases. All killings outside of this proposition that I have given

you embracing the condition which is an accidental killing, all conditions outside of that are willful conditions in the law. Now, of course, you are to look to all the circumstances to see what the intent of the party was. You are to look at the very relation that existed between the party killed and the defendant. It is important, when searching for the existence of this characteristic of the crime of murder, to gather up in your minds all evidence that shows the relation of the parties towards each other, the feeling of the defendant towards his father, the manner of the execution of the deadly purpose, and the very character of the weapon used, the nature of the wounds produced, and the repetition of the shots producing these wounds. All these are prominent features that can not be ignored by you in looking at this characterisation of the case known as that it was done willfully. I say it is important that you should do that, because the law says that if a killing is done willfully and done without justification—that is, it can not be set up as an act done
209 under the law of self-defense, and done without mitigating facts, when the proof shows it was willfully done it shows it was done with malice aforethought, and consequently shows that it was murder. Now, I might perhaps detain you a moment by reading from a celebrated case as to the finding of "willfully"—the case of the Commonwealth v. York, a case decided and passed upon by the supreme court of Massachusetts:

"A sane man, a voluntary agent, acting upon motive, must be presumed to contemplate and intend the necessary, probable, and natural consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion is that he intended to destroy such person's life. It is the natural conclusion from the act done. If he points a gun at another in shooting distance, and fires it upon that other, and the party fired upon is killed, the law says that he intended to kill him. The law says that it is an intentional act."

In another case, where one of the present members of the Supreme Court of the United States, in talking to a jury upon the subject of malice aforethought (I mean Justice Field when he was holding United States circuit court in California), said:

"Malice is implied in every case of intentional homicide. That is to say, when once it is established that a person was intentionally killed, or willfully killed, the law implies that malice existed in the party who caused the death, and if there are any circumstances of excuse or palliation which will rebut the implication of malice it is incumbent upon him to show them. The burden of proof rests upon him, for the law presumes that every person intends to produce the results which are the usual consequences of his acts. A man can not strike another violently with a bar of iron without inflicting bodily pain. If, therefore he does thus strike another, the law presumes that he intended
210 thus to inflict pain."

Now, another proposition:

"The usual effect of a leaden ball fired from a loaded pistol of the common size at a distance of a few feet only, striking the head or back of the person, is to kill such person. The law therefore presumes that everyone who thus fires a loaded pistol within a few feet of an object intends to kill. It therefore implies malice in him."

Now, that is along the line of the proposition that I have already enunciated to you, that if the killing is done willfully and done in the absence of facts that under the law of self-defense as I shall give it to you, would give the right to the defendant to slay his father or the right to ask at your hands that you could regard the offense as one that was mitigated under the law—if there is an absence of both of these conditions and the facts show that the killing was willfully done, as they must show it if they show that he pointed the gun within shooting distance of his father and fired it at him three times, and that he was struck by these balls—I say if the facts show that condition, if there is an absence from the case of that which justifies it or mitigates it, that proves not only the existence of the characteristic known as willfully, but it proves the characteristic which is the chief one of the crime of murder, and that is that it was done with malice aforethought, because perhaps the best definition of that expression which enters into the crime of murder, or characterises it, which goes to show what it is that makes murder, in my judgment, is the one which says that malice aforethought means the doing of a wrongful act in a case like this which results in death in such a way as to show that the party who did it was not justified in doing it, and that he could not ask that the crime be reduced in its grade to one of lesser
211 degree than that of murder—a wrongful act, done without just cause or excuse, and in the absence of mitigating facts. Now, you have that act, and you have it proven, whenever you have a willful act which results in death, an act done intentionally, such as shooting with a Winchester gun, and if that act is not justified, or there is not that in the case with reference to the conduct of the deceased at the time of the killing which under the law you can take into account to reduce the grade of the crime, the very same state of case that would show under such circumstances the doing of an act willfully would show that it was done with malice aforethought. Now, another definition of that expression is—and it is a very powerful one when we come to understand it, though it is brief. It really comprehends the great duties of life that rests upon us towards our fellow-men, and consequently towards our God, because what is a duty to our fellow-man is a duty also to our Maker. The highest duty that rests upon us is not recklessly, wantonly, and unnecessarily to destroy human life, but to protect it, and that duty increases, is intensified, when it devolves upon members of the family circle, because families are organized for the purpose of protecting each other from the violence of men in the outside world. The tie that binds us together, known at the tie of blood, is given to us by nature to bind us together with a degree of affection that we may stand by each other and protect each other when in the right. Not only does that duty rest upon us with reference to the family and members of the family, but it rests upon us with reference to the great family which makes up the nation, and the world in fact. As long as a man is innocent, and as long as he is not an offender, it is the duty of every other man not to destroy his life, but to protect it, even at the risk of his own. That is good neighborship. That is the very letter and spirit of the Golden Rule, which commands us to do unto others as we would have others do unto us. Now,
212 then, if a man forgets this great obligation to such an extent as to take human life in such a way as to show that he has a heart void

of social duty, and a mind fatally bent upon mischief, the law says that he does an act that has malice aforethought in it, that has in it that characteristic of the crime of murder, because the taking of a human life in such a way as to show a heart void of this social duty that I have named, and the execution of that act in such a wanton and wicked way as to show that he who executed the act had a mind fatally bent upon mischief, you that have a comprehensive definition of this characteristic of the crime of murder called malice aforethought. Now, it may arise from two conditions—at least two conditions. The truth is, that the very seed from which germinates this condition that produces murder, from which springs forth this thing called malice aforethought that characterises murder, is a debased mind; is a mind governed not by right, governed not by the rules which should govern men, but controlled by a base and wicked purpose. It originates in the mind, and it originates there because of special spite, or grudge, or ill will entertained by the party killing against the one whom he kills, or it originates because that mind is so debased, so demoralized, so depraved as that it is controlled by a spirit of what the law calls general malevolence, general recklessness of human life. If there was a state of bad blood existing between the slayer and the one slain, as shown by the testimony, as shown by the evidence, then you can attribute the existence of malice aforethought to that cause. If that is absent, and you still have an act which results in death done without just cause or excuse, or in the absence of mitigating facts, then you can *con*tribute it to this state of general mal*e*volence or gross recklessness of human life which prompt men very frequently and very often to become slayers of their innocent fellow-men. You sometimes have a combination of these purposes. The fact is, that if a man kills another because of a desire to satisfy a special spite, or to wipe out a grudge, or to satisfy a spirit of ill will, he is always prompted by
213 such a spirit of general malevolence, because that contributes to make his mind reckless, to make it wicked, to make it depraved, to prompt him to go forward to strike to the death wrongfully, illegally, and improperly and wantonl/y and wickedly his fellow-man.

In Lander v. State it was said:

"When the law makes use of the term malice aforethought as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked and malignant spirit. (1 Russ. on Cr., 482.) Malice 'in its legal sense denotes a wrongful act done intentionally, without just cause or excuse.' (1 ib., 483, n. i., 5th Am. from 3rd London edit.) 'The legal import of the term,' it has been said, 'differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill will to an individual, but means any wicked or mischevious intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable cause.'"

Now, of course, if we have a state of case where there is ill will, if the proof in this case shows ill will upon the part of the defendant, and that he killed the deceased, his own father, in satisfaction of that ill will, you have a right to take that into account as evidence of the existence of a premeditated design to kill, and the existence of malice aforethought.

Again, reading from the same case:

"'Malice in law is a mere inference of law, which results
214 simply from a willful transgression of the law.' (2 Stark. Ev., 674.) It imports simply the perverse disposition of one who does an act which is unlawful, without a sufficient legal excuse therefor; 'and the precise and particular intention with which he did the act, whether he was moved ira vel odio, vel cause lucri, is immaterial; he acts maliciously in willfully trangressing the law. * * * For if the motive is to govern in determining the degree of crime, then, of course, in that view it can make no difference in what manner the killing was affected; whether by lying in wait, 'by poison, starving, or torture' or by 'other premediated and deliberate killing;' or whether 'committed in the perpetration or attempt' to perpetrate any of the crimes mentioned in the statute; still the enquiry might be, by what real motive and disposition of mind the party killing was actuated; and if the jury should be of the opinion that it really was not 'from a wicked and malicious intent, but from a just and well grounded apprehension for the preservation of his own life' from future danger, it would only be murder in the second degree. * * *

Now, it seems to me that that is about as full a definition of this characterising trait of murder as need ordinarily be given. You are always, of course, in every case to look to see what the motive for the killing was; not that you are required to find it. You may find a killing that is wantonly, recklessly, and unlawfully done, and done without justifiable cause, and you can not find any motive for it. Many of the most wicked murders are murders of that kind, and it would be nonsense to say that before the jury could convict a man of such a murder that they must find his motive. But in a case where the motive is manifest, if it is attributable to ill-will, to a state of bad blood, to bad passions generated, and which have had an existence for some time, you can use
215 that motive for the purpose of enabling you to characterise the killing; to enable you to see what the manner of the killing was; to see whether it was done with malice aforethought, or done in such a way as to be excusable. But a word further from another case upon the subject of malice. Now, of course, this is the trait which distinguishes this killing as murder, if you find it to be of that kind, from any other kind of homicide of less grade, and it is important that we should get into our minds exactly what is meant by this distinguishing characteristic of the crime of murder. I have told you already that it means a killing done unlawfully to start with, and willfully, and done in such a way as to show that he who did it had no right under the law of self-defense to do it, and that there wasn't that in the case in the shape of the conduct of the deceased to reduce the grade of the crime that it might be called manslaughter; in short, a killing wantonly and wickedly done, without justifiable cause, or in the absence of mitigating facts.

"Malice has been defined as a deliberate intent to kill. It does not necessarily import any especial malevolence towards the individual slain, but also includes the case of a generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief. It imports premeditation."

That is, the purpose to kill is thought of beforehand. Now, of course, you are to distinguish (and I have to be particular upon this point; I have my reasons for it, and it is not necessary to name to you what they are) between a case where a man prepares simply to defend himself and keeps himself in the right in that defense, and a state of case where he prepares himself recklessly, wantonly, and without just cause to take the life of another. If he prepares himself in the latter way, and he is on the lookout for the man he has thus prepared himself to kill and he kills him upon sight, that is murder, and it would shock humanity or
216 even the most technical and hair-splitting court to decide anything else. That can be nothing else but murder. If he is in the right—if he is in the right at the time of the killing—and simply prepared himself to defend his own life, that is preparation not to take the life of another, but preparation to defend himself. That is the distinction, a distinction that is clear and comprehensive.

"It means that it was a premeditated act, and that means that there must logically be a period of prior consideration as to the purpose to do this act, but as to the duration of that period no limit can be arbitrarily assigned."

A man has the purpose to kill another wrongfully and improperly when he has no right to kill him, and if that purpose springs into his mind contemporaneously with the execution of it that is premeditation, because he can form a design to kill, and in this age when we have these death-dealing weapons, improved as they are, he can have that purpose and execute it at once, and the fact that he has prepared himself to execute it, and the fact that he executes it, shows that he premeditated the act and that he thought of it a sufficient length of time to enable him to commit it in a systematic and regular way, and in a way to produce death, and that is thought of beforehand, that is premeditation. You must bear in mind, just as this jurist tells you in his charge to the jury, that the quickest thing to act in this world is the human mind. It is so quick that we are not conscious of its action. We do not know when our own minds are acting. We act unconsciously. The mind thinks with very great rapidity. It gives its command to the members of the body with such rapidity that we become unconscious of the action of the mind as it is acting in that way. He says:

"The time will vary as to the minds and temperaments of men, and as do the circumstances in which they are placed. The human mind acts at times with marvelous rapidity. Men have sometimes seen the events of a lifetime pass in a few minutes before their mental vision.
217 Thought is sometimes referred to as the very symbol of swiftness. Malice means an intent of the mind and heart. There is never presented to a jury direct evidence of what was the intent of the man's heart at the time."

If the intent of the man's heart was to slay another wrongfully and improperly, it is not to be presumed that he is going to appear before a

jury and tell them that. If so, he would plead guilty, because that makes the crime of murder. That goes to show, if his act is done in that way, and he has a heart of that character, that his act can be only characterized as murder, but he denies that by his very plea of not guilty. And if he does not tell it, how are you going to get at it? You must know it. You must know the condition of his mind as best you can. Now, how are you going to get at it?

"The existence or non-existence of malice is an inference," this court says, "to be drawn by the jury from all the facts in the case."

If the act of killing was done wrongfully, done without justifiable cause, done, if you please, wickedly, wantonly, and in such a way as to show a total disregard of human life, you can take that condition into account to enable you to see what the mind of the party who committed the act in that way was at the time he committed it. If you find it was in such a condition as to show him to be the possessor of a heart void of social duty, and that mind, as evidenced by the execution of the deadly purpose, was such as to show that it was fatally bent upon mischief, you have the condition of mind shadowed forth in such a way as to show that it was controlled by malice aforethought, that it was controlled by this characterising trait of the crime of murder. You get at it by inference. You can know it in no other way. *No* human power can fathom it in any other way.

"The emotions of the heart, the processes of the mind, are to us, or to anyone outside of the individual, exhibited by the acts which the individual performs, and we are entitled to infer what his intent was,
218 and what were the processes of his mind and the feelings of his heart." How? How are we to infer what his intent was? "By a careful study of the acts which he performs, and all the other external indications which he may have given of what his state of mind and heart was. As an eminent text writer has put it, there is no case of malicious homicide in which malice is not inferred from attendant circumstances, no case in which it is demonstrated by positive evidence. We have no power to ascertain the certain conditions of a man's heart. The best we can do is to infer his intent, more or less satisfactorily, from his acts. Now, a person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, then it is not necessary to prove that such design existed for any definite period before the fatal blow. From the very fact of a blow being struck we have a right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant. And thus we frequently find the statement laid down in reported cases and by text writers that malice is to be inferred from the use of a deadly weapon. Put thus baldly the statement of the proposition is hardly fair to the defendant. It is true, if that is all the evidence in the case. Proving the death, proving the slaying with a deadly weapon, and stopping there, we are warranted in inferring malice, and therefore in finding the crime to be murder. But it is very, very rare that that is all the evidence in the case. Your own experience, from what you have heard

and what you have read, certainly must instruct you that there is hardly ever, if indeed ever (I never heard of one), a case where the only fact proved against the defendant, or the only fact proved in his favor,
219 was the killing of the deceased with a deadly weapon."

You see you can not get at a case in that abstract way when you are proving the killing with a deadly weapon; that act of killing in that way is always attended by a great many other circumstances going to characterise the use of that deadly weapon, going to show whether it was a case under the law that gave the party the right to use it in that way, or going to show what manner of mind he possessed when he was using it in that way. If you prove the use of a deadly weapon that brings along with it those other circumstances that we are authorized to take into consideration to characterise the use of that weapon, and it becomes easy in that way to find out whether malice aforethought exists, or whether the other trait or characteristic of the crime of murder known as that it was done willfully exists.

"The moment a single other fact is admitted into the case this statement of the proposition becomes misleading, unless the jury bears in mind the caution which I will give you. Malice is to be inferred from all the facts in the case. If malice is found, it must be drawn as an inference from everything that is proved, taken together and considered as a whole. Every fact, no matter how small, every circumstances, no matter how trivial, which bears upon the question of malice, must be considered by the jury at the same time that they consider the use of a deadly weapon, and it is only as a conclusion from all those facts and circumstances that malice, if inferred at all, is to be inferred. To murder, the existence of malice is absolutely essential. If there is not malice, and the homicide is not excusable, then it must be manslaughter."

I have now told you what the crime of murder is, in the law, and, of course, that is what you are to be governed by. It is a killing done in such a way as to show it was done willfully and done with malice aforethought. There are but two crimes growing out of the taking of
220 human life under the law of the United States. I have defined to you the crime of murder, which is one of them. The other is known as manslaughter. Manslaughter is a crime where there must exist as growing out of the conduct of the party slain at the time he was slain something which can be taken into consideration by the jury to mitigate the grade of killing from murder to the one of less grade known as manslaughter. Manslaughter usually grows out of a state of case where two men are engaged in an affray—a fist and skull fight, for example, fighting with the hands and fist—and one of them, without having prepared to do so previously, without having made previous preparation to take life if he had an opportunity to take it, and in the affray or otherwise one of them suddenly draws a deadly weapon, in the absence of this preconceived design to use it if opportunity offered, and without deliberation as is contemplated by the law, without premeditation as the law defines it, he suddenly slays his adversary—that is manslaughter. Now, that is a state of case which is defined by some of the law authorities as a condition midway between a state of self-defense and murder. It occupies a kind of a midway position. Juries are not to be misled by it, because it may be easier and more comfortable for them for the time being to find that grade of crime than

to find the other. You will bear in mind that there are two things that bear upon you, and in the discharge of your duty you must meet them manfully and bravely. The first is to find if a crime exists, and, secondly, to name that crime correctly, not to name it falsely, not to name it in some other way than that authorized by the law, because it is by the law and the evidence you are to try the case. Now, then, these mitigating facts which reduce the killing so as to make it manslaughter can not be previous acts of violence exerted at some other time, and so far in the past as that there was time for the blood to cool, or the party to think or to deliberate—it can not be an act of that kind that can be taken into account to
221 mitigate the crime. Nor can they exist in the shape of previous threats made at some other time than the killing, or, if you please, if the proof had shown that they were made at the time of the killing, because threats of violence, mere threats of that character, can not be used to justify nor to mitigate a killing, unless they are coupled with some other condition which I will give you in connection with the law given you showing the figure that threats cut in a case. A man threatens another, he may threaten his life in a violent way, and that other can not kill him because of that. He may threaten him, and the threat may be communicated to the party; he could not go and hunt him up and kill him because of that, for the reason that if a man is brought into a court of justice because he has made threats against another, that court has no right to take his life because he has made these threats, and the citizen has no higher right in dealing with human life than has the courts of the country. The citizen is not permitted to weigh in one side of the scale a threat made against him, and in the other side the life of the man who made that threat, and to destroy that life because it was made. If threats were made previous to the time of the killing, and they were not coupled with the condition that they may be used to illustrate, as I will give it to you presently, and the party kills because of those threats, that is evidence of spite, that is evidence of grudge, that is evidence showing that he kills because of ill-will and special animosity existing upon his part against the party who is slain. Now, this is the definition of manslaughter; this is what makes it; the law says it is the killing of another willfully and unlawfully and in the absence of malice aforethought. There must be out of the case that which I have defined to you as malice aforethought. If that is out of the case, under the law, as that case is shown by the evidence that you deem to be reliable, and there is yet crime,
222 there could be no other crime except the one arising under this classification.

Now, the other condition, and the one that has been invoked here, is that the defendant had a right to kill his father. Well, if he had, of course you are to say so. You are to settle that question as you are to settle his guilt, if guilt exists, in accordance with the law. You are to settle it in accordance with the terms of the law which gives a man the right to slay another, and you are to settle it by the evidence which shows that state of case which the law says must exist before a man can slay his fellow-man. It is incumbent upon me to give it to you. You are to make the application of it if you find the state of case to which you can apply it. But if you do not find that state of case as illustrated by the evidence, of course you can make no application of it here, because while these

different propositions are given to you you are simply to apply the one that in your judgment is applicable to this case as shown by this testimony. Now, as briefly as I can I will give to you these propositions of the law of self-defense, showing you when a man can slay his fellowman. You will bear in mind that this is a law of necessity. It is a law, as its name implies, of defense—of self-defense. It is not a law of vengeance. It is not a law that gives a man the right to kill another because he may have threatened that other, or because there is a state of bad blood between them, or between members of his family and that other. The law does not authorisze that. It is called a law of necessity, because there is, in contemplation of that law, as illustrated by the testimony, a state of case existing at the time of the killing that jeopardizes apparently or really the life of the slayer, and that he acts in a state of case void of malice aforethought; that he acts with a heart that is void of malice, that is void of this social duty, but a heart prompted simply by a desire, in a case where he can exercise this law, to act upon the defensive to protect
223 himself, to protect his own life. You will bear in mind further that this law is a law of proportion. A man can not slay another because that other may commit a simple assault upon him, or threaten a simple assault, or give him an ordinary castigation such as a father would give a son, or nothing of that kind. He can not put a human life in the balance and weight it against an act of that kind and destroy that life because that condition may exist. It is a law of proportion. It is emphatically a law of justice. It is a law of right, and it is in the interest of the protection of the just rights of men when the juries of the country properly understand it and properly apply it. If they pervert it, if they misunderstand it, if they use it as a rubber blanket to cover a case of crime, that is a perversion of the grossest kind and tends to disgrace it in the estimation of peace-loving and law-abiding men. Now, there are two propositions in it. There are other principles. All the principles are embraced in these propositions, but some of them it is better that they should be further illustrated. The first proposition is as follows: "A man who is in the lawful pursuit of his business"—I will tell you after awhile what is meant by that. I will tell you, in short, in this connection it means that the man is doing at the time just exactly what he had a right to do under the law. When so situated he is attacked by another under circumstances which denote an intention to take away his life, or to do him some enormous bodily harm, he may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power." Now, that means by its very language that the party was in the right at the time. If he was hunting up his father for the purpose of getting an opportunity to slay him without just cause and in the absence of legal provocation he was not in the right, and the consequence would be that he would be deprived of the law
224 of self-defense, as you will learn presently, when such a condition as that exists. Now, of course, in this connection—and I am this particular again for certain reasons—you are to draw the distinction between a state of case where a man arms himself, where there is ill-will or grudge or spite or animosity existing, and he hunts up his adver-

sary and slays him, and the state of case where he simply arms himself for self-defense. He has a right to do the latter a' long as he is in the right, but he has no right to do the former, and if he does the former and slays because of that condition he is guilty of murder. Now, let us go over this again: "When he is in the lawful pursuit of his business and is attacked by another under circumstances which denote an intention to take away his life"—now, inquire on that part of the proposition whether or not at the time that William Allison was shot at by the defendant and killed, whether or not he attacked John Allison in such a way as to indicate from the nature of that attack a purpose upon his part to take then and there the life of John Allison, because any other attacks that may have been past and gone can not give the party the right to slay; if he slays because of danger that may have existed, but has ceased to exist, he is not defending himself, but he is an avenger; he is not using the law of self-defense, but he is executing the law of vengeance, and when that is sought to be executed that evidences a heart void of social duty and a mind fatally bent upon mischief—"is attacked by another under circumstances which denote an intention to take away his life"—go to the evidence, I say, and see whether that condition existed. If it did not exist, then this proposition could not apply to the defendant so as to protect him. If it existed, other duties still rest upon the defendant before he can slay. What are they? The law says he may lawfully kill him if they exist. If he was making an attack upon the defendant at the time he slew him, in such a way as to indicate from the nature of the attack a purpose to take his life or to do him great bodily harm, then the defendant may lawfully kill him, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he could or disabling his adversary by less violence than that which he exercised. If a man is attacked by another in a deadly way his duty is to get away from that attack; it is to avoid it. That is his duty to himself, because he may get killed from it. His own safety commands it. His duty to the man attacking him commands it. If he can avoid it by getting out of the way of the danger, notwithstanding the danger is real, notwithstanding it is actual, notwithstanding it then and there exists and is deadly in its character, if the party can avoid it the law imperatively commands him to do so. If he can not avoid it by getting out of the way of it, but can destroy the danger coming from his adversary by the exercise of less violence than that which produced death, the law says that he must do that. You will see that the taking life by the citizen is the dernier remedy; it is the last resort; it is the last thing that he can fly to. Now, that is the state of case where the danger is actual, where it is real, and it does not mean a state of case where threats may have been made, because threats alone do not create a state of case either real or apparent, but it means, in the language of this law, that he is attacked by another. It is not attack upon a man to threaten him. That is not an attack upon him. It means the doing, or about to do, of some act of physical violence of a character that may destroy human life; that may result in the death of the party thus attacked or do him some great bodily harm. Now, we come to the other proposition, and one that you are to note with the greatest care, because jurors

are sometimes deceived by it. They are sometimes honestly misled by it. You are to see exactly what is meant by this proposition called the law of apparent anger, that you may not make a misapplication of it in this case. You are to note with care what is required to be shown before a man can say, I killed one of my fellow-men, or I killed my father, because of the existence of apparent danger to my life, or of great bodily harm to my person. Let us read the proposition and then let us read the amplification of it, that we may the better understand it, to see whether or not in this case the facts created such a state of case as to show that the conduct of William Allison at the time he was slain was of a character that would create a state of either real or apparent deadly danger, or danger of great violence to the person, really or apparently. "When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life or commit any felony upon his person, the killing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended." That is, now, death or any great violence to the person. Let us read it over again. "When from the nature of the attack—" Now, that does not mean a case where a man has a bare fear in his mind from relations that may have existed between himself and the man he kills, or between members of the family and the man he kills—that he has a bare fear of that kind. You will learn presently that a man can not act upon bare fear and take human life, but from the very words used it means that the party at the time was doing an act which apparently was an act of deadly violence. That is what it means, because the law says "from the nature of the attack." You look at the act of violence or apparent violence that he was doing and judge from its nature whether it was an act of that kind. "When, from the nature of the attack"—not that the defendant may have believed it, or that any man may believe it. You have heard in argument here, incidentally dropped, no doubt, because these things have been repeated here so often in this court that every child knows what the law of self-defense is, that if a man thinks he has a right to slay
226 he can slay. That is a great misapprehension of what this proposition of the law is, and what it means. If that was the case how many men when they were arraigned for the killing of a human being would not assert that they thought they had a right to kill; they might be mistaken, but they thought so. I perhaps had a misunderstanding of the law, but then they thought they had the right to kill. What a perversion of this protection agency called the law of the land this would be. No, that is not the law. It must be shown by the evidence that the party who was slain was at the time doing something that would satisfy a reasonable man, situated as was the defendant, that the deceased, William Allison, then and there was about to do that which would destroy the life of the defendant, and that he could not prevent it except by doing as he did do. The question as to whether that is the state of case or not is a question that is to be finally passed upon by the juries of the country, and by you in this case, and you must have something more tangible, more real, more certain, than that which is a simple declaration of the party who slays, made in your presence by him as a witness when he is confronted with a charge of murder. All men would

say that. No man created would say otherwise when confronted by such circumstances, and the juries, as a matter of fact, would have nothing to do but to record the finding which was willed or established by the declaration of the party who did the killing. Now, the law does not mean that. It means, according to its language here, that there must have been made upon the defendant, or about to be made, so nearly being executed that he could not get away from it, that which seemed to be a real attack by William Allison, and an attack, too, of a deadly character, or of a character that might inflict great violence upon his person, and that he could not escape from it, just as under the other proposition he is required to do, or that he could not avoid it except by using the
228 degree of violence that he did use, by firing first into the body and then into the head of the man that he shot. That is the law of apparent anger. But let us see how it is amplified by the courts, because in this way its meaning is expressed so that we may more clearly understand what is meant by it. Now, the best explanation to be found anywhere, in my judgment, is in the declaration of the learned supreme court of the State of Mississippi, in the case of John Evans v. The State, where the judge, in deciding that case, in passing upon the question as to whether the court below had properly charged the jury, said:

"To shoot down another on sight, and who at the time is making no hostile demonstration dangerous to life or limb, and especially if not prepared and armed so to do, is in law murder. It is murder, because the law tolerates no justification, and accepts no excuse, for the destruction of human life on the plea of self-defense except that the death of the adversary was necessary, or apparently so, to save his own life, or his person from great bodily injury, and there shall be imminent danger of such design being accomplished. The danger to life, or of great personal injury, must be imminent, present at the time of the killing, really or apparently, and so urgent that there is no reasonable mode of escape except to take life. When we use the term 'apparent'—'apparent danger'—we mean such overt actual demonstration by conduct and acts of a design to take life, or do some great personal injury, as would make the killing apparently necessary to self-preservation."

Now, let us read that over again. "When we use the term 'apparent' or 'apparent danger' we mean such overt"—that means outward—"such overt actual demonstration by conduct and acts of a design to take life, or to do some great personal injury, as would make the killing apparently necessary to self-preservation." It is not a state of bare fear. As he tells you here "to shoot down another on sight, who at the time
229 is making no hostile demonstration dangerous to life and limb, and especially if not prepared and armed so to do is in law, murder." If a man acts upon bare fear, and shoots another because of that, that is not self-defense. The party at the time he was slain, or so near to that time that the one who slays him can not avoid what seems to be the real or apparent deadly danger, or danger of great violence to his person, must have been making "some overt actual demonstration by conduct and acts of a design to take life, or to do some great personal injury as would make the killing apparently necessary to self-preservation." Now, that court gives an illustration: "If A, who had threatened the life of B, presents at him a gun in shooting posture and within range,

B might well anticipate the fire, and if he should kill A he would be justified, although it should turn out afterwards that the gun was not loaded, and it was only intended to frighten." There was an act done which was apparently dangerous to life in execution of a threat. He had drawn the gun, presented the gun at another, and the court says that there was an act done apparently dangerous to life, judging from the way it was done. But, suppose there is a state of case where the man has not drawn any weapon, has no weapon upon his person, makes no such demonstration as that it can be reasonably relied upon as indicative of a purpose to draw a deadly weapon, and he is shot under such circumstances. The law of apparent danger, as I have laid it down to you from the books here, as it is declared in the books, can not excuse an act of that character, can not excuse an act of that kind.

I have now undertaken to give to you these propositions of the law of self-defense. There are other things in this connection that it is necessary for you to note, because under the law it matters not what the conduct of the deceased may have been at that time; if either one of these conditions I am about to give you existed the defendant is deprived
230 of the right of self-defense, he is cut off from it, he can not resort to it. What are they? What are these things that deprive a man of the right of self-defense? You see, the law says, and it says it substantially in both of these propositions, relative to real and apparent danger, that a man must be in the right himself. It expresses it by saying that he must be in the lawful pursuit of his business. Now, if he does any one of these things that I am about to read to you he is regarded as being so far in the wrong as to deprive himself of the right of self-defense, no matter what may be the conduct of the man slain. What is the first thing that deprives him of that right? Commencing an assault, attack or battery upon another. If a man commences that without any justifiable cause, of course the other could not kill him for that, because that would destroy this law as a law of proportion as I have given it to you. But suppose the other returned the assault, and the one who makes the first assault upon him of a simple character, with his fist or hand, and slays him, he can not plead self-defense. There might be a state of case growing out of a specific attack of the party that he slays that would give him the right to say it was manslaughter, but he is not without crime. He is the first aggressor; he is not in the lawful pursuit of his business. He is therefore deprived of the right of self-defense no matter what his adversary may be doing when he does that. Again, attacking another with a deadly weapon. If a man attacks another without just cause, or in the absence of mitigating facts, with a deadly weapon, what right should he have to set up self-defense when the other undertakes to resent that attack or defend himself against it? He is the wrongdoer, and he is the wrongdoer in a deadly way. The law says, therefore, when that state of case exists he is deprived of the law of self-defense. Now, further; going to the place where the person slain is, with a deadly weapon, for the purpose of provoking a difficulty or with the intent of having an affray. A man arms himself and hunts up another
against whom he has bad feeling, or between the two there is bad
231 blood, there is animosity existing, there is a grudge to be satisfied, and he arms himself and he goes to the place where the slain per-

son is, with a deadly weapon, not with the purpose of standing upon the defensive while he is in the right himself from attacks made by the other party—that he has a right to do—but for the purpose of provoking a difficulty, for the purpose of having an affray that he may kill the man who he has hunted up. That is murder, and nothing else. Because the fact that he, under such circumstances, arms himself, prepares himself, and goes to the place to hunt a difficulty, to have an affray, when it is not necessary for his own protection, for his own defense, the fact that he does these things shows by the most indubitable testimony and by the clearest proof that he has premedi'ated over the killing, that he has thought of it beforehand, that he has deliberated upon it, and therefore you have that which shadows forth the existence of malice aforethought. The fact of his preparing to take life under such circumstances, not preparing simply to defend himself when he is in the right, but to hunt up his adversary and slay him, when he does that, the selection and preparation of the weapon and the execution of the design under such circumstances shows premeditation; shows willfully doing an act without just cause or excuse; shows the selection and preparation of a weapon used not in a defensive way, but in an aggressive way, in a way where he is executing now the law of self-defense, but the law of vengeance. Again, using provoking language or, it seems, resorting to any other device in order to get another to commence an assault so as to have a pretext for taking his life. Now, that shadows forth a state of case where men, as they often do, go to another and provoke him to do something by the use of abusive language, to make some movement with his hand, to do something that can be shown before a jury as a demonstration sufficient to create apparent danger. Whenever they do that, no matter what demonstration
232 the other party may make, if it is shown that the words are used for that purpose, the party can not set up self-defense. Again, provoking another for the purpose of bringing him into a quarrel or so that an affray is commenced; agreeing with another to fight him with deadly weapons. These conditions, if any of them exist, the party is deprived of the right of self-defense; he is cut off from it, no matter what the man slain may have been doing, because he is not in the lawful pursuit of his business, and these cases where a man can act in real or apparent danger to life are cases where he is so far in the right as that he is not designing to place himself in either one of these conditions that I have named to you. Now, this is the law of self-defense.

You want to know, of course, what figure threats cut. Evidence has been offered here of threats made by the deceased. You want to know what office they perform in the case, how you are to view them, whether you are to say that the law authorizes you to say that if a man has been threatened at some time previous to the killing and that he kills because of these threats, or he kills when no overt demonstration of violence, really or apparently, is being made by the party slain at the time, whether or not those threats can be taken into consideration by you to excuse that killing or to mitigate it. Now, we will go to the law as it has been declared from time immemorial to ascertain what office they do perform, why it is that they are admitted. You will understand that there are two things connected with it: First, as to their competency—that is, whether they go to the jury at all or not; and secondly, after they have

gone to the jury then comes up the question of their credibility—that is to say, what office they are to perform. First you are to find if it is true, and then what office it is to perform as a proving fact in the case. Now the fact that they goes to the jury as a competent fact does not determine the fact either of their credibility or of the office that it is to perform
233 in your hands, because there are conditions that you are to find, and must necessarily find, before you can consider these threats at all as threats that would justify or look towards justification, or that could be taken into account to mitigate the crime. If they can not be used in either one of these ways, and the killing was done because of those threats, they become evidence of malice aforethought against the defendant, and they can be used in that way. Now, there are two kinds of threats. There are threats that are communicated to the party who slays, and there are what are called uncommunicated threats. A communicated threat is not one that gives the party the right, because it is made, to hunt up the man who makes it and kill him. If that was the law human life would be even more cheap, if it were possible, than it is. I mean innocent human life, I do not mean *guilty* human life. That is in scarcely no danger at all. I mean innocent human life. It would be less protected, if possible, than it is now, because if A wanted B killed he could go and tell C that B had made threats against him, and C would go and kill him and come before a jury and plead that threats had been made and communicated to him, and it might turn out afterwards that B never thought of such a thing, knew nothing of the threats, and his life was stolen from him by the villa'ny and lying of the man A. The law does not contemplate such a terrible condition as that. It does not contemplate that law-abiding men, men who are entitled by the law of God and of man to protect and enjoy their lives, shall have them thus jeopardized and shall have them thus to be in the hands of reckless and wicked men, who have no regard for the law of the land or this high duty that rests upon them to preserve life rather than to destroy it. Now, what office do they cut? I read to you from the authorities collected in the able dissenting opinion of a member of the Supreme Court of the United States in a case pending before it, collected by Mr. Justice Clifford, a jurist of the ripest mind and of the greatest experience:

234 "Courts of justice everywhere agree that neither the bad character of the deceased, nor any threats that he may have made, forfeits his right to life until by some actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief upon the part of the slayer that it is necessary to deprive him of life in order to save his own or prevent some felony upon his person."

Some great violence upon his person. Now, you see, they do not cut any office at all in favor of a defendant unless at the time, in this case, his father was doing some act, making some actual attempt, to execute the threat, as shown by some act or demonstration at the time of the killing, taken in connection with the threat, that would induce a reasonable belief upon the part of the slayer that it was necessary to deprive his father of life in order to save his own or prevent some felony upon his person. That is the law, stated plainly, as to the office of communicated threats. You see, they are what are called illustrative facts. They

are not substantive facts, which can stand alone and give the party the right to slay because of them, but they must be coupled with a condition growing out of an act or conduct of the deceased, of the man killed, in this case William Allison, at the time of the killing. If he was doing some act or making some demonstration that really or apparently was of a character that indicated a design to take life, then the defendant could couple previous threats made with the act or demonstration. Now, the act or demonstration must have gone sufficiently far to show a reasonable purpose or to induce a reasonable belief, when coupled with threats, under the circumstances, that that was William Allison's purpose at the time. It must have gone to that extent. It must have gone sufficiently far, the overt act done by him, as to induce a reasonable belief, when coupled with threats, that that was his purpose. When that is the
235 case, when there is that sort of act in existence, then the previous threats can be taken into account together with the act. Again:

"Jurists and text writers appear to concur that antecedent threats, whether communicated or not, will not justify a subsequent deadly assault by the other party unless the party who made the previous threats manifests at the time of the act a design to carry the threats into immediate effect."

Some act must exist which really or apparently indicates a deadly purpose upon his part. Now, you see that no matter how many threats William Allison may have made against his family, and no matter to what extent this family broil had gone, this defendant because of threats of that character could not hunt him up and shoot him down because of those threats. If that was the state of case the threats can not be considered in his favor, but they may be considered to show that he killed him because of malice, because of malice aforethought existing, because of a spirit of spite, or ill-will, or grudge, that he was seeking to satisfy by that sort of attack.

Now, let me read to you a little further upon this line that a bare fear upon the part of a man does not create a state of apparent danger:

"The belief on the part of the accused that the deceased designed to kill him is no excuse for a homicidal act, unless the deceased at the time made some attempt to execute such a design and thereby induced the accused reasonable to believe that he intended to do so immediately."

Hence the court held it was not competent for the accused to introduce evidence of an assault that the deceased committed on him six weeks before, or to give evidence of previous uncommunicated threats, the other evidence showing that the deceased at the time of the killing made no hostile demonstration against the accused calculated to show that the accused was in any danger of life or limb.

236 "Repeated threats even of a desperate and lawless man will not and ought not to authorize a person threatened to take the life of the threatener, nor should any demonstration of hostility short of a manifest attempt to commit a felony, justify a measure so extreme."

"Where one without fault is attacked by another under such circumstances as to furnish a reasonable ground for apprehending a design to take away his life, or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design

will be accomplished, the assailed may safely act upon the appearances and kill the assailant, if that be necessary to avoid the apprehended danger."

"Unless the party has reasonable grounds of apprehension at the time the justification will fail, it being settled law that a bare fear unaccompanied by any overt act indicative of a supposed intention will not warrant the party entertaining such fear in killing the other party by way of protection, if there be no actual danger at the time.

"Remarks already made are sufficient to show that bare fear of danger to life, unaccompanied by any overt act or manifestation indicative of a felonious intent to that effect, will not justify a person entertaining such fears in killing the supposed assailant. Such a defense is not made out unless all the conditions of the proposition above explained occurred in the ordinary circumstances which attended the act of homicide."

Now, that tells you more fully what the doctrine of the law is as to what is dominated bare fear. There must be in existence some act being done by the party at the time he is killed that must have so far ripened towards execution as to afford a reasonable ground for belief that he then and there has a deadly purpose in his mind, and he is then and there in
the act of executing it, or attempting to execute it. Before pre-
237 vious threats can be considered for the purpose of illustrating
that act that condition must exist. If these previous threats alone are proven, there is no condition to illustrate. There is nothing to illustrate: The conduct of the party slain must be taken in connection with the threats when that conduct has so far, I say, ripened towards execution as to afford reasonable belief that he is then and there in the act of executing a deadly purpose. If that is absent, if the proof does not show it, then the threats can not be considered in favor of the defendant.

Now, gentlemen, these are the different propositions of the law that have been invoked in this case. There are two things that enter into your verdict—the law and the evidence, or the law and the truth of the case. Wherever there is a conflict in the evidence it is your duty to observe even greater care than when you are noting facts that fall from witnesses where there is no conflict, to see where the truth lies. You are to look at the evidence that is offered in the case in the light of its reasonableness, in the light of its probability, in the light of its consistency in itself and its consistency when compared with other testimony. Again, in this case, where there is a homicide as in this one, see if there were any eyewitnesses to the killing; see what their statements are; see if they substantially agree, not that they must necessarily agree in every minor particular, because the testimony of no two witnesses, when they are telling the truth, necessarily do that. Men have different ways of narrating a thing, and that may produce a difference in nonessentials, but when you look at it substantially the evidence that is true will substantially agree. I say, look at the evidence of these eyewitnesses; see what their statements are; see what the position of these parties was, the party killed and the defendant in this case, at the time of the killing, as shown by these witnesses,
see what the character of the wounds were that were inflicted
238 upon the deceased; see where they were inflicted. The witnesses
brought here upon the part of the Government who claim to be

eyewitnesses, and who have examined the wounds, say the first wound was inflicted in the back. That is a fact, not, as was remarked by the assistant district attorney in his argument before you, that absolutely determines the character of this case or the degree of guilt that is in it, if you find guilt, but it becomes an important item in corroboration of the statements of the witnesses who have testified before you as to the character of the wounds. Now, then, you take that fact, and you weigh it in that way. Then you see whether or not there are other circumstances that were not witnessed as direct, proving facts by these witnesses here, but that tend to corroborate what they say. If so, that strengthens their evidence; it makes it stronger than it might be if standing alone. Then you are to see, in looking at the credibility of the evidence, what the interest is that witnesses have, if any, in the case. You will bear in mind that an ordinary citizen brought into court to tell what he knows is not put in a position where he is prompted to have any undue interest that would affect his testimony. He is presumed to stand so indifferent and so impartial that his relation to the case will not affect the truthfulness of the narrative which he gives. You could find no ground for presumption against the evidence of such witnesses from that source. If parties are closely related to the case, have a deep interest in it outside of the usual interest manifested by citizens, you have a right to take that into account in weighing their evidence, because we are all creatures of such a character that we are liable to be influenced by the interest we have in the result of the transaction. The defendant has gone upon the stand, and he has made his statement. See if it is in harmony with the statements of witnesses you find to be reliable. If they are not, they
239 stand before you as contradicted. If they are, they stand before you as strengthened as you may attach credit to the corroborating facts. In passing upon his evidence you are necessarily to consider his interest in the result of this trial, in the result of this case. He is related to the case more intimately than anybody else, and you are to apply the principle of the law that is laid down everywhere in all civilized countries commanding you to look at a man's statements in the light of the interest that he has in the case. There is no odor of sanctity thrown around the statements of the defendant as a witness, as is sometimes supposed, because he is charged with crime. You are to view his statements in the light of their consistency, their reasonableness, and their probability, the same as the statements of any other witness, and you are to look at them in the light of the interest he has in the result of the case. You are to view these statements by these rules of law that I have given you to enable you to get at the truth. There is a conflict here in this testimony. You are to reconcile that conflict if you can upon the theory of an honest mistake. If you can not do it, you are to find the truth by the application of these reasonable rules that I have given you. You are to find who is telling the truth, who is giving to you that state of case that you can depend upon as true. Now, in corroboration of the statements of the manner of this killing, and of the attitude of the parties at the time, you have the right to look at the very wounds that were inflicted; you have a right to take into consideration the character of these wounds, and the part of the body, or parts of the body, upon which they were inflicted. You have a right to take them into consideration

when you are searching for this element of the crime of murder known as malice aforethought, to see whether this shooting was done in a wanton, wicked, diabolical, and reckless way, in a way to show a reckless feeling towards innocent human life; and if so, these wounds become pertinent facts in the case to enable you to say what character of crime it is, or whether it is a crime or not.

Now, the law says before you can convict a man you are to be satisfied beyond a reasonable doubt of his guilt. That does not mean that there is some far-off, mythical degree of certainty that you are expected to attain when it is impossible to attain it by the rules of logic or of law. It does not mean that. The law in all of its provisions is reasonable, and it is just, it is wise. It does not command you to do a duty and then forbid you from doing it by making it impossible for you to execute that duty. But it tells you that when a man is charged with crime that the burden of proving that crime is upon the Government, the party that charges it. Every man is panoplied with a presumption of fact called a presumption of innocence. The law holds out the idea that all men are innocent, just as it holds out the idea that all men are truthful, but it does not put up a presumption so conclusive in its character that it is not to be overturned by proof. That presumption only prevails just so long as the proof fails to overturn it, or to establish to the reasonable satisfaction, or to the satisfaction of reasonable men, that degree of certainty called proof beyond a reasonable doubt that guilt exists. When the proof goes that far and satisfies the minds of twelve reasonable men to that extent, the presumption of innocence disappears; the proof has dispelled it; it is driven out of the case. Now, let me tell you what is meant by this rule of law which says you are to be satisfied by proof beyond a reasonable doubt, quoting from instructions given in the case of the United States v. Haupt, and approved by the Supreme Court of the United States:

"The court charges you that the law presumes the defendant innocent until proven guilty beyond a reasonable doubt. The court further charges you that a reasonable doubt is a doubt based on reason, and which is reasonable in view of all the evidence. And if after an impartial comparison and consideration of all the evidence you can candidly say that you are not satisfied of the defendant's guilt, you have a reasonable doubt; but if after such impartial comparison and consideration of all the evidence you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, you have no reasonable doubt."

I say relating to the affairs of other men, because when it comes to our passing upon the question as to whether a case is proven beyond a reasonable doubt, if we are to measure that state of case by a state of case affecting our own affairs we are more liable to lean towards our own affairs than we would be to remain indifferent, and the proper way, in my judgment, to put the proposition and to do justice to the defendant is to say if your minds are carried to that degree of certainty that you would be willing to act upon in the more weighty and important matters relating to the affairs of others of importance, then you have no reasonable doubt.

"In many cases," the court says, if the jury is told that they should be satisfied of the defendant's guilt beyond a reasonable doubt, that that

is sufficient. "In many cases it may undoubtedly be sufficient. It is simple, and as a rule to guide the jury is as intelligible to them generally as any which could be stated with respect to the conviction they should have of the defendant's guilt to justify a verdict against him. But in many instances, especially where the case is at all complicated, some explanation or illustration of the rule may aid in its full and just comprehension. As a matter of fact it has been the general practice in this country of courts holding criminal jurisdiction to give such explanation or illustration. This rule may be and often is rendered obscure by attempts at definition of it, serving to create doubts instead of
242 removing them, but an illustration like the one given in this case by referring to the conviction upon which the jurors would act in the weighty and important concerns of life would be likely to aid them to a right conclusion when an attempted definition might fail. If the evidence produced be of such convincing character that they would unhesitatingly be governed by it in such weighty and important matters, they may be said to have no reasonable doubt respecting the guilt or innocence of the accused, notwithstanding the uncertainty which attends all human evidence. The instruction in the case before us is as just a guide to practical men as well can be given, and if it were open to criticism it could not have misled the jury.

"The instruction is not materially different from that given by Lord Tenterden, as repeated and adopted by Chief Baron Pollock, in Rex v. Muller. 'I have heard,' said the chief baron, addressing the jury, 'the late Lord Tenterden frequently lay down a rule which I will pronounce to you in his own language: "It is not necessary that you should have a certainty which does not belong to any human transaction whatever. It is only necessary that you should have that certainty with which you should transact your own most important concerns in life."'"

I modify that as I modified the other instruction in that regard.

"No doubt, the question before you to-day—involving as it does the life of the prisoner at the bar—must be deemed to be of the highest importance; but you are only required to have that degree of certainty with which you decide upon and conclude your own most important transactions in life. To require more would be really to prevent the repression of crime, which it is the object of criminal courts to effect."

That is a correct definition of what is meant by proof beyond a reasonable doubt.

Now, gentlemen, it is your duty to take this evidence, to see in
243 the first place whether this man named as the man who was killed, William Allison, was killed, and whether he was killed by the defendant, and whether he was killed willfully and with malice aforethought. If you are satisfied of that beyond a reasonable doubt, or as reasonable men would require their minds to be satisfied upon a matter of importance and gravity affecting another, that is the conclusion of the case and your duty would be to find the defendant guilty of murder as charged in this indictment. If you are not satisfied of the existence of that crime, but still satisfied of a killing, and of a killing by the defendant, and that the other crime exists—if you are satisfied of that beyond a reasonable doubt, your duty would be to find him guilty of the

crime of manslaughter. You must find the state of case that I have given you to warrant you in finding him guilty of that crime as well as you are required to find the state of case that I have given you to find him guilty of the crime of murder. If you are not satisfied beyond a reasonable doubt that either one of these crimes exists, your duty would be to acquit him upon the ground of self-defense.

Gentlemen, you will take all these facts, gather up the accusatory facts in the case, whether they come from positive eye-witnesses, or from circumstances, and see what their combined weight is. Then if they satisfy you beyond a reasonable doubt of crime, gather up the excusatory facts that you find to be true. You will pass upon the truthfulness of both of these sets of facts. You are to see what explanation is offered by these facts that are offered for the purpose of excusing or justifying. You are to see what state of case is the true state of case, and you are to apply these reasonable rules that I have given you in doing that to enable you to come to a rational conclusion in the case; to find the truth as best you can, and to fasten your faith to that truth, and base your verdict upon it. The case is submitted to you. You will find blank forms upon the back of this indictment.

(Defendant files exceptions.)

244 To which charge of the court the defendant offered and filed the following exceptions, before the jury retired:

245 1st. That the charge of the court upon the subject of the gun or weapon used by defendant in the killing is argumentative and misleading, and states that if the gun was used intentionally, consequently wilfully, &c.

2nd. To the charge of the court upon the subject of a wilful killing and malice aforethought, and states that the same state of case that shows a killing wilfully would show it done with malice aforethought.

3rd. To the charge of the court upon the subject of family relation is argumentative and misleading, and as to deeds of spite, to wipe out grudge, &c.

4th. To the charge of the court upon the preparation of a weapon, saying to the jury what a certain state of facts will prove argument.

5th. To the charge of the court upon the subject of malice aforethought, in saying that malice may be the conception of a moment, the fact that he executes it (the act) shows that he premeditated it. And also excepts to the illustration given to show the rapidity with which a malicious purpose to kill may be conceived and executed.

6th. To the charge of the court upon the subject of manslaughter.

7th. To the charge of the court upon the subject of self-defense.

8th. To the charge of the court upon the subject of the conditions upon which a defendant would lose the benefit of the law of self-defense, and the fact stated and principles of comparison used in the application of the principle laid down and its argumentative application.

9th. To the charge of the court in saying that the defendant must have something more than his own statement as to how the killing occurred to prove that he is justifies in the killing; every man would say that, &c.

246 10th. Because the charge of the court is prolix, argumentative, abstract, and misleading.

11th. To the charge of the court stating that the use of provoking language and abusive language, &c., at the time of the killing, because there is no evidence in this case to support the charge upon this subject.

12th. To the charge of the court when he says that the defendant would have no right to hunt up the deceased and kill him, because there is no evidence in this case to support the charge upon the subject.

13th. To the charge of the court upon the subject of previous communicated threats and uncommunicated threats, that the charge upon that subject is argumentative and misleading.

14th. To the charge of the court upon the subject of apparent danger which would justify a killing, that the charge upon that subject is argumentative and misleading.

15th. To the charge of the court upon the subject of the extent and character of the overt act or demonstration at the time of the killing to entitle the jury to take into consideration previous threats made by the deceased.

16. To the charge of the court in referring to the wounds, in saying that you are to look at these facts to see if the crime was committed in a wicked, wanton, cruel, and diabolical way.

J. WARREN REED,
THOS. H. BARNES,
Attys. for Deft.

(Endorsed on back:) Filed in open court May 27, 1895. S. Wheeler, clerk.

247 Whereupon the jury retired to consider of their verdict, and after deliberation returned into court the following verdict, to wit:

"We, the jury, find the defendant, John Allison, guilty of murder, as charged in the within indictment.

(Signed) "JOSEPH A. FALLIN, *Foreman.*"

Whereupon the said court sentenced the defendant to be hanged upon Tuesday, October 1st, 1895.

The defendant tenders this his bill of exceptions, and prays that the same be approved and signed and made a part of the record, which is accordingly done.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

(Endorsed on back:) Filed July 12, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

248 *Assignment of errors.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES
vs. } Murder.
JOHN ALLISON.

The defendant in the above-entitled cause, John Allison, files this his assignment of errors committed on the trial of the above cause, to wit:

First. The court erred in its charge to the jury in saying: "Now, then, if a man forgets this great obligation to such an extent as to take human

life in such a way as to show that he has a heart void of social duty and a mind fatally bent on mischief, the law says that he does an act that has malice aforethought in it, that has in it that characteristic of the crime of murder, because the taking of a human life in such a way shows a heart void of this social duty that I have named, and the execution of that act in such a wanton and wicked way shows that he who executed the act had a mind fatally bent on mischief; you thus have a comprehensive definition of this characteristic of the crime of murder called malice aforethought."

Second. The court erred in its charge to the jury in saying: "Now, of course you are to distinguish between a case where a man prepares simply to defend himself and keeps himself in the right in that defense, and a state of case where he prepares himself recklessly, wantonly, and without just cause to take the life of another. If he prepares himself in the latter way, and is on the lookout for the man that he has thus prepared himself to kill, and he kills him upon sight, that is murder,
249 and it would shock humanity, or even the most hairsplitting and technical court, to decide anything else. That can be nothing else but murder. If he is in the right, if he is in the right at the time of the killing, and simply prepared himself to defend his own life, that is preparation not to take the life of another but preparation to defend himself. That is a distinction, a distinction that is clear and comprehensive."

Third. The court erred in its charge to the jury in saying, "A man has the purpose to kill another wrongfully and improperly, when he has no right to kill him, and if that purpose springs into his mind cotemporaneously with the execution of it, that is premeditation, because he can form a design to kill, and in this age when we have these death-dealing weapons, improved as they are, he can have that purpose and execute it at once, and the fact that he has prepared himself to execute it and the fact that he executes it, shows that he premeditated the act and that he thought of it a sufficient length of time to enable him to commit it in a systematic and regular way to produce death, and that is thought of beforehand, that is premeditation."

Fourth. The court erred in its charge to the jury in saying, "The existence or nonexistence of malice is an inference, this court says, to be drawn by the jury from all the facts in the case."

Fifth. The court erred in its charge to the jury in saying, "You are to draw the distinction between a state of case where a man arms himself, where there is ill-will or grudge, or spite, or animosity existing, and he hunts up his adversary and slays him, and the state of case where he simply arms himself for self-defence. He has a right to do the latter so long as he is in the right, but he has no right to do the former, and if he does the former and slays because of that condition, he is guilty of murder."

Sixth. The court erred in its charge to the jury in saying, "Now inquire on that part of the proposition whether or not at the time
250 that William Allison was shot at by the defendant and killed, he attacked the defendant in such a way as to indicate from the nature of that attack a purpose upon his part to take then and there the life of John Allison, because any other attack that may have been past and gone can not give the party the right to slay."

Seventh. The court erred in its charge to the jury in saying: "If a man is attacked by another in a deadly way, his duty is to get away from that attack. It is to avoid it. That is his duty to himself, because he may get killed from it. His own safety commands it. His duty to the man attacking him demands it."

Eighth. The court erred in its charge to the jury in saying: "It must be shown by the evidence that the party who was slain was at the time doing something that would satisfy a reasonable man, situated as was the defendant, that the deceased, William Allison, then and there was about to do that which would destroy the life of the defendant."

Ninth. The court has erred in[n] its charge to the jury in saying: "The question as to [o]whether that is the state of case or not is a question that is to be finally passed upon by the juries of the country, and by you in this case, and you must have something more tangible, more real, more certain, tha[p]n that which is a simple declaration of the party who slays, made by him in your presence as a witness when he is confronted with a charge of murder. All men would say that. No man created would say otherwise when confronted by such circumstances, and the juries, as a matter of fact, would have nothing to do but to record the finding, which was willed or established by the declaration of the party who did the killing."

Tenth. The court erred in its charge to the jury in saying: "Because there are conditions you are to find and must necessarily find before you can consider these threats at all, as threats that would justify or look towards justification or that could be taken into account to mitigate the crime. If they can not be used in either one of these ways, and the killing was done because of those threats, they become evidence of
251 malice aforethought against the defendant[m], and they can be used in that way."

Eleventh. The court erred in its charge to the jury in saying: "If that was the state of case the threats can not be considered in his favor, but they may be considered to show that he killed him because of malice, because of malice aforethought existing, because of a spirit of spite, or ill-will, or grudge that he was seeking to satisfy by that sort of an attack."

Twelfth. The court erred in its charge to the jury when giving the law as to manslaughter in saying: "If threats were made previous to the time of the killing, and they are not coupled with the condition that they may be used to illustrate—as I will give it to you presently—and the party kills because of those threats, that is evidence of spite, that is evidence of grudge, that is evidence showing that he kills because of ill-will and special animosity existing upon his part against the party so slain."

Thirteenth. The court erred in refusing to permit Mrs. Margaret Allison, a witness for the defense, to testify after her recall to the contents of an alleged threatening letter in the alleged handwriting of the deceased, in which deceased threatened to take the lives of herself and family, including defendant, which had been received by her, and which had been delivered to her by witness, J. Warren Reed, and which it was alleged had been lost by the said Reed, and which had been searched for by the said Reed, Margaret Allison, and others, as more fully appears by the testimony of Margaret Allison after her recall, as shown on pages 182

to 184, inclusive, of the typewritten testimony, and by the testimony of witness, J. Warren Reed, as shown on pages 164 to 169, inclusive, of the typewritten testimony.

Fourteenth. The court erred in refusing to permit witness, Margaret Allison, after her recall as a witness for the defense, to testify that the letter mentioned in the thirteenth assignment was in the handwriting of the deceased.

252 Fifteenth. The court erred in refusing to permit witness, Margaret Allison, after being recalled as a witness for the defense, and witness J. Warren Reed to testify fully as to the circumstances of the search that had been made for the letter mentioned in the 13th assignment.

Sixteenth. The court erred in refusing to permit counsel for the defendant to state the alleged contents of the letter mentioned in the 13th assignment, with sufficient particularity to properly show that it was material evidence for the defendant.

J. WARREN REED,
BARNES & MELLETTE,
Attys. for Def't.

(Endorsed on back:) Filed July 12, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

253 *Petition for writ of error.*

In the United States circuit court for the western district of Arkansas.

UNITED STATES
vs. } Murder.
JOHN ALLISON.

To the clerk of the circuit court of the United States for the western district of Arkansas:

Your petitioner, John Allison, respectfully represents that at the May term, 1895, of this court he was convicted on the indictment No. , charging him with the crime of murder, and that the said court has pronounced judgment and sentence of death upon this petitioner on the verdict of the jury convicting him as aforesaid.

Your petitioner alleges that in the record and proceedings in the trial of petitioner's cause in said court there is great and manifest error to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said circuit court in said cause, remanding the said cause and the record therein to the said Supreme Court, in order that the same may be there reexamined and, if error be found, that the said judgment and sentence against him therein may be reversed.

JOHN ALLISON,
By J. WARREN REED and BARNES & MELLETTE,
His Attorneys.

(Endorsed on back:) Filed July 12, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

254 *Poverty affidavit.*

In the circuit court of the United States for the western district of Arkansas.

UNITED STATES)
vs.) Murder.
JOHN ALLISON.)

I do solemnly swear that I am the identical John Allison tried and convicted at the May term, 1895, of the United States circuit court for the western district of Arkansas of the alleged crime of murder; that I am now under sentence of death in said court;

That I am prosecuting a writ of error under sec. 6, chapter 113, of an act to abolish circuit-court powers of certain district courts of the United States, and to provide for writs of error in capital cases and for other purposes; that I am poor and utterly unable to pay the costs of prosecuting said writ of error, not being possessed of property of the value of twenty dollars, or of any value whatever, so help me God.

JOHN ALLISON.

Subscribed and sworn to before me by John Allison this 12th day of July, 1895.

STEPHEN WHEELER, *Clerk*,
By J. D. BERRY, *D. C.*

(Endorsed on back:) Filed July 12, 1895. S. Wheeler, clerk, by I. M. Dodge, D. C.

255 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the U. S. for the western dist. of Ark., greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States, plaintiff, and John Allison, defendant, a manifest error hath happened, to the great damage of the said John Allison, as by his complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13 day of July, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN WHEELER,
U. S. Circuit Clerk for the Western Dist. of Ark.,
By I. M. DODGE, *D. C.*

Allowed by—

——— ———,

——— *Justice of the Supreme Court of the United States.*

256 UNITED STATES OF AMERICA, *ss:*

To Jas. S. Read, U. S. attorney for the western district of Arkansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of the U. S. for the western dist. of Ark., wherein John Allison, plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. C. Parker, U. S. dist. judge for the western dist. of Ark., holding circuit court this 13th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

I. C. PARKER,
U. S. Dist. Judge, holding Circuit Court.

On this ——— day of ———, in the year of our Lord one thousand eight hundred and ninety ——, personally appeared ——— ——— before me, the subscriber, ——— ———, and makes oath that he delivered a true copy of the within citation to ——— ———.

Sworn to and subscribed the —— day of ———, A. D. 189 .

I, Jas. F. Read, U. S. atty. for the western dist. of Arkansas, hereby accept service of the within citation and waive service by an officer.

JAS. F. READ, *U. S. Atty.*

257 UNITED STATES OF AMERICA,
Western District of Arkansas:

I, Stephen Wheeler, clerk of the circuit court of the United States for the western district of Arkansas, in the eighth circuit, hereby certify that the foregoing transcript, annexed to this certificate, is a true and complete copy of the record and proceedings in the case of U. S. vs. John Allison, the original of which remains of record in my office.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Fort Smith, in said district, this 16 day of July, A. D. 1895.

[SEAL.] S. WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

(Indorsement on cover:) Case No. 15983. Term No. 693. John Allison, plaintiff in error, vs. The United States. W. Arkansas C. C. U. S. Filed August 6th, 1895.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN ALLISON, PLAINTIFF IN ERROR, v. THE UNITED STATES. } No. 693.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN ALLISON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 693.

MOTION TO ADVANCE.

The plaintiff in error, a white man and not an Indian, was indicted at the February term, 1895, of the circuit court of the United States for the western district of Arkansas for having murdered his father on the 5th of January, 1895, at the Cherokee Nation, in the Indian country. He was tried, found guilty, and on July 9 sentenced to be hanged.

The Solicitor-General respectfully moves the court to advance the case on the docket and set it down for hearing on such day during the term as may be convenient to the court.

Notice of this motion has been served on the plaintiff in error and his counsel in the court below, and proof of service filed with the clerk.

HOLMES CONRAD,
Solicitor-General.

Office Supreme Court, U. S.
FILED.
NOV 15 1895
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

Case No. 603.

OCTOBER TERM, 1895.

JOHN ALLISON,

Plaintiff in Error,

VERSUS

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

Wm. M. CRAVENS,

Attorney for Plaintiff in Error.

THOMAS & RIGGINS, PRINTERS, FT. SMITH, ARK.

...IN THE....

SUPREME COURT OF THE UNITED STATES.

Case No. 693.

OCTOBER TERM, 1895.

JOHN ALLISON,

Plaintiff in Error,

VERSUS

THE UNITED STATES,

In Error to the Circuit Court of the United States for the Western District of Arkansas.

STATEMENT OF CASE.

The defendant, John Allison, who is a boy scarcely twenty years old, was convicted of the crime of murder, for the killing of his father, William Allison, in the Cherokee Nation, Indian Territory, in January of the present year.

The circumstances which led up to this killing disclose

a course of most outrageous conduct upon the part of the father killed, towards his wife, and family, and more especially toward this defendant. The family consisted of the father, mother, and ten children, and up to the year 1893, the State of Washington had been their home. During that year, the father, and deceased, William Allison, as a fitting climax to a continued course of illtreatment, had committed an assault upon his son, and son-in-law, Mr. Knapp, by shooting at them with a pistol, and was sent to the penetentiary for one year, for that crime. Prior to that time his wife had secured a divorce from him, and the property had been divided and the husband had taken the part which he claimed.

After the imprisonment of William Allison, the family in order to get away from him, and to avoid further trouble, conceived the idea of practically crossing the continent, and locating in the Indian Territory. This idea was carried out. There was no element of discord in the family except the father. They were all united in the desire to leave the State which had been their home for years, to avoid the scenes of domestic strife which had been going on for a great length of time. The mother brought together all the sons and daughters, together with their children, and with this little colony of twenty-three, came to their new home in the Indian Territory.

They had been located scarcely a year, when the father appeared, first at Hot Springs, Arkansas, where one daughter, with husband and family had located, and then came to the neighborhood of the other members of the family in the Indian Territory.

He at once began threatening the lives of the entire family, as he had done for years before they left Washington. There was probably never a case presented to a court wherein was disclosed so many violent and seemingly intentional threats to do bodily harm, as will be found in this record. This feature of the case can only be understood by reading the testimony of the following witnesses, in full, to-wit:

O. H. Knapp, Mrs. Ellen Turner, Dora Thompson, Minor Perkins, Jasper Allison, Minor Allison, Albert Allison, Robert Allison, Margaret Allison and Defendant.

It may be said that this testimony comes from members of the family, with but one or two exceptions. That is true. But when it is considered that the deceased had only been in the Indian Territory about a month at the time of the killing; that the defendant and family or poor; that the process of the court does not run for the defendant, outside of the Western District of Arkansas, the objection will not have much weight.

The threats as found in the testimony of these witnesses contemplated the destruction of defendant, his mother, brothers, and sisters, older and younger than himself, by dynamite, the knife, and the gun, and from them one can well imagine the continual dread that existed in the hearts of these people of some awful impending fate.

The killing occurred at the house of a Mr. Farris, where the deceased had been making his home, about eight o'clock in the morning. The defendant testified that he was riding by the place and saw a person whom he took to be his brother

up at the house, and that he stopped at the stable thinking that his brother would come down that way. He had learned from his sister that his brother Jasper was to be at that house at that time, for the purpose of hauling a load of household goods to town; that he knew his brother would drive his wagon out by the stable; that he did not go up to the house because he did not want to meet his father. That shortly after he had arrived at the stable his father came through the gate and on towards him; that when he was within fifteen or twenty feet of him he said: "You have got it have you?" and threw his hand back as though he was going to draw a pistol. And because of the threats he had made, he believed he was going to then and there kill him, and he threw up his Winchester and shot three times in rapid succession until his father fell.

Defendant stated that the reason he was going that way with his gun, was that he and a man by the name of Rucker had killed a deer above there the day before, and he had promised Rucker to come back the next day to hunt for others. The two Lowthers—witnesses for the government—say that when defendant came to the stable he told them he was going hunting.

There was no witness introduced by the government to contradict defendant, as to what took place just previous to the shooting. There were three witnesses to-wit: John Farris, P. H. Farris and A. J. Lowther, who were called eye witnesses, but neither one of them saw every thing that

occurred. Lowther did not see the first or last shot. P. H. Farris saw none but the last, and John Farris was so far away that he could not tell what did occur.

There was a contention over the fact as to where the ball which passed through the body of deceased entered, whether in front or behind. The Farris' and the Lowther's testified that in there opinion the ball entered from the rear, while for the defense, O. H. Knapp, Robert Allison, J. D. Hall, Doug Binns and Frank Rucker, testifiegl that in their opinion all the balls entered from the front.

The most important features of the testimony are presented in the above statement, leaving many, however, which will be noticed by an examination of the record.

BRIEF AND ARGUMENT.

The assignments of error up to and including number twelve, refer to alleged errors in the charge of the court. The assignments are true and exact extracts, from the charge, but owing to the fact that the printed record has not yet been furnished, counsel can not make the proper reference to pages, etc.

Without commenting upon the first assignment, we will consider the language of the court as set forth in the second assignment. This portion of the charge was given in discussing the question of malice aforethought a necessary element of the crime of murder. The necessary inference from the language used by the court, is that if a man arms

himself for the purpose of self defense, he must keep himself entirely in "the right," or he is guilty of the crime of murder. It does not permit the jury to find that he is only guilty of the crime of manslaughter.

In the first part of the extract the court uses this language: "Now of course you are to distinguish between a case where a man prepares simply to defend himself, and keeps himself in the right in that defense." We also find this language in the latter part of the quotation: "If he is in the right at the time of the killing and simply prepared himself to defend his own life, that is preparation not to take the life of another, but preparation to defend himself." That language is misleading because if a man is in the right at the time of the killing, it does not matter what he prepared himself to do. The question of preparation does not enter into the case. But according to this language, he must have been acting in self defense or he is guilty of murder.

The fifth assignment should be considered with the third as the same question of preparation, is considered in discussing malice aforethought. The reasonable import of the language of the court set forth in this assignment is that a man has a right to arm himself for self defense if he is in the right at the time of the killing, and if not he is guilty of murder.

The language in these two assignments is in substance the same, and conveys identically the same idea as the language used by the same court in charging the jury, in the case of *John Gourke vs. United States*, 153 U. S., 183.

It declares that although a man may arm himself for the purpose of self defense, yet if he kills under circumstances which do not make a case of self defense, the previous arming and preparation, indicate premeditation, and cut the defendant off from a verdict of manslaughter, although the facts at the time of the killing would make a case of manslaughter. Mr. Justice Harlan in delivering the opinion of the court, in the Gourko case above referred to, says:

"Assuming, for the purposes of the present inquiry, that the defendant was not entitled to an acquital as having acted in self defense, the vital question was as to the effect to be given to the fact that he armed himself with a deadly weapon after the angry meeting with Carbo in the vicinity of the postoffice.

If he armed himself for the purpose of pursuing his adversary, or with the intention of putting himself in the way of his adversary, so as to obtain an opportunity to kill him, then he was guilty of murder. But if, in view of what occured near the postoffice, the defendant had reasonable grounds to believe, and in fact believed, that the deceased intended to take his life, or to inflict upon him great bodily harm, and, so believing, armed himself solely for necessary self defense in the event of his being pursued and attacked, and if the circumstances occuring on the occasion of the meeting at or near the saloon were such as, *by themselves*, made a case of manslaughter, then the defendant's arming himself, after the difficulty near the postoffice, did not have, in itself, the effect to convert his crime into that of murder. Stated

in another form: Although the defendant may not have been justified on the occasion and under the particular circumstances of the difficulty at the billiard saloon in believing that the taking of his adversary's life was, then and there, necessary to save his own life or to protect himself from serious bodily harm; nevertheless, the jury were not authorized to find him guilty of murder because of his having deliberately armed himself, provided he rightfully so armed himself for purpose simply of self defense, and if, independently of the fact of arming himself, the case tested by what occurred on the occasion of the killing was one of manslaughter only.

The court, in effect, said—or the jury may, not unreasonably, have understood the court as declaring—that preparation, by arming, although for self defense only, could not be followed, in any case by manslaughter, if, the killing, after such arming, was not, in fact, in necessary self defense. Such we understand to be the meaning of the charge. In our opinion the court erred in so charging the jury. If the accused was justified in the eye of the law in arming himself for self defense, and if without seeking, but on meeting his adversary, on a subsequent occasion, he killed him, not in necessary self defense, then his crime was that of manslaughter or murder, as the circumstances, on the occasion of the killing, made it one or the other. If guilty of manslaughter, looking alone at those circumstances, he could not be found guilty of murder by reason of his having previously armed himself solely for self defense."

This court in the case of Thompson vs. United States consider the same question of preparation and arrive at the same conclusion as in the Gurko case.

The objection to the language of the court as found in the fourth assignment, is that the court speaks of the existence or non-existence of malace aforethought being "an inference" to be drawn by the jury, &c. It ought not to be an inference but a conclusion.

In the sixth assignment attention is called to the language of the court in giving the law of self defence, as to what kind of an attack upon the part of the deceased would have justified the defendant in repelling it. The court says, that the attack of the deceased must have indicated then and there an intention to take the life of John Allison, the defendant, before the latter would have been justified in taking life. We think that the proposition is well established, that the attack need not go to the extent, of or be indictive of an intention to take life, before the assailed can repel it by killing. If there is only danger of great bodily harm, that danger can be the basis of a plea of self-defense.

The seventh and eighth assignments call attention to similar language of the court in other parts of the charge, and it cannot be said that because the court, in several instances, said in substance that the danger must be to life, or "of great bodily harm," would remedy the effect of the lahguage quoted in these three assignments. The jury might have only remembered that which is above mentioned and if so the defendant would have suffered by the error.

The language of the court quoted in the ninth assignment takes away from the jury the right to say what weight should be given to the testimony of the defendant. The court says: "You must have something more tangible, more real, more certain, than that which is a simple declaration of the party who slays, made by him in your presence as a witness, when he is confronted with a charge of murder. All men would say that. No man created would say otherwise when confronted by such circumstances &c."

The defendant in this case was a witness for himself, and we insist was the only witness who really saw what the deceased was doing just preceeding, and at the time of the killing. But the court says that the jury must not believe what he says about it. That it must have something more real and certain, than that. We think the jury had the right to believe the defendant to the exclusion of every other witness, and that the court should have submitted his testimony to it, subject to the same rules as any other witness.

The tenth, eleventh and twelfth, assignments, quote language of the court upon the subject of threats. The court says in substance that if the proof does not show a state of case where the threats are admissable to show justification on the part of the defendant, and he kills because of those threats, then the threats become evidence of spite, grudge, and special annimosity upon the part of the defendant against the deceased. The language of the court on this subject is the same as that used in United States vs. Thomas Thompson, passed upon by this court, except that here the court adds: "And the party

kills because of those threats," but we think the language is still very objectionable. The language is strong enough to have caused the jury to believe that it was their duty to consider the threats as showing special spite, etc. Threats might cause a feeling of this kind and they might not. It would at least require other proof than bare threats themselves to show that this spite existed because of those threats, and there was nothing of that kind in this case. Nor was there the least indication that he killed because of these threats. The attorney for the government did not claim it because he said the threats had never been made. Then there might be a case, where a defendant thought that because of threats he had a right to kill, where the law would not entirely justify him, when it would not make the threats admissable for the defendant, but yet he might only be guilty of manslaughter. Yet the court in this case says that if they are not admissable for the defendant, they can only be taken against him as an evidence of spite, ill will, etc.

In the case of Thompson vs. United States, 155 United States Reports, this same question was before this court, and Mr. Justice Shiras, in delivering the opinion of the court, says: "We think there was also error in that portion of the charge wherein the court instructed the jury as to the effect which they should give to the evidence on the subject of previous threats, uttered against the defendant by Hermes, and his sons. The learned Judge seemes to have regarded such evidence not merely as not extenuating, or excusing the act of the defendant, but as evidence from which the jury might infer special spite,

special ill will, on the part of the defendant. The language of the learned Judge was as follows:

* * * * * * * * * * * *

"But if threats are made and there is an absence from the case of the conditions, I have given you where you can use them as evidence, you can only use them, and consider them for the purpose of showing the existence of special spite, or ill will, or animosity on the part of the defendant."

Justice Shiras, continuing, says:

"While it is no doubt true, that previous threats will not in all circumstances justify, or perhaps even extenuate the act of the party threatened, in killing the person who uttered the threats, yet it by no means follows that such threats, signifying ill will, and hostility on the part of the deceased, can be used by the jury as indicating a similar state of feeling on the part of the defendant. Such an instruction was not only misleading in itself, but it was erroneous in the present case, for the further reason that it omitted all references to the alleged conduct of the deceased at the time of the killing, which went to show an intention then and there to carry out the previous threats."

The latter part of the quotation from the opinion of this court in the Thompson case can well be applied to this case also.

The thirteenth, fourteenth, fifteenth, and sixteenth, assignment, cover objections to the action of the court in refusing to permit Margaret Allison to testify to the contents of a threatening letter she had received from the deceased a short time be-

fore he was killed, to which action of the court the defendant at the time excepted. The contention of the defense was that the letter had been received by Margaret Allison ; that it contained threats against the lives of herself and family, including the defendant ; that it had been delivered by her to J. Warren Reed, one of the attorneys for defendant, and that it had been mislaid and lost by him.

The testimony of Mrs. Allison upon her re-call shows that she received such a letter ; that it was delivered to Mr. Reed, who put it in the left hand drawer of his desk ; that she saw it afterwards and was reading it, and she saw him put it back in that drawer ; that during the trial herself and daughter, and Mr. Reed had searched for the letter but could not find it.

Mr. Reed testified that the letter was delivered to him, and that he had put it in the drawer of his desk. That he had searched for the letter and that it was not in his office that he could find ; that when he made his opening address to the jury he supposed he had the letter, but afterwards could not find it.

It will be seen by reference to the testimony of Margaret Allison upon her re-call, and the remarks of counsel and the court, in connection therewith, that the court refused to permit Mrs Allison to testify to the contents of the letter because its loss was not properly established.

The court also refused to allow counsel to state fully the contents of the letter so that the record could show that it was clearly material evidence for defendant.

We deem it unnecessary to cite any authorities on the question as to when the contents of a lost instrument of writing can be proven, and as to how that loss is to be established. The tendency of the courts of the present day, is toward greater liberality in this direction, and we insist that the loss of this letter was properly established, and that the court improperly excluded it from the jury.

The parts of the testimony wherein the controversy occurred, can not be referred to by page for the reason that the printed record has not been furnished.

The forgoing is respectfully submitted.

WM. M. CRAVENS,

Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED.
NOV 20 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN ALLISON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 693.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

JOHN ALLISON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 693.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

John Allison, the plaintiff in error, a young man 20 years of age, was indicted for the murder of his father, William Allison, a white man and not an Indian, in the Cherokee Nation on January 5, 1895. He was tried before Judge Parker and a jury and convicted May 28, 1895.

THE RECORD.

This is one of the cases where the Government is required to do what printing is necessary to be done, while the bill of exceptions is mainly composed of alto-

gether immaterial matter. For this reason, in accordance with the formal request at page 6 in the record, only a few extracts are printed from the bill of exceptions, these extracts containing the testimony on behalf of the defendant with relation to the killing, together with all the testimony on his behalf concerning threats against his life made by his father shortly before the killing, and which threats are claimed to have affected his actions. The testimony bearing on the alleged letter, whose exclusion forms the subject of the only exception prior to the instructions of the court, is also inserted. The balance of the testimony is merely abstracted.

Those portions of the bill of exceptions which are merely abstracted and not copied verbatim are indicated by the side marks "9d," "9e," etc. The portions which are extracts *in hæc verba* from the original transcript, and which are believed to be the only portions material to any of the exceptions, are indicated by the paging of that transcript.

STATEMENT OF FACTS.

The testimony of the prosecution's witnesses tended to show that the defendant, John Allison, without any provocation whatever, encountering his father, William Allison, near the barn of one John Farris, with whom the old man was residing, shot him three times in cold blood, the last two times after he had fallen to the ground (p. 6).

Defendant himself was the only other witness to the killing. He testified that he went up toward the Farris

barn to speak to one of the family. He then proceeded as follows (pp. 7, 8):

> I knew my father was up at the house, and I didn't want to go up by the house for I was afraid he might raise a racket, and I did not want to raise any racket with him, and I just staid at the barn; and the first thing I knew he came out to the corner of the house and went back in, and came out again, went down to the barn—he came right through the gate, never went to the right or left either, but just came right straight toward me. He just came right up, and he got about 12 or 15 feet from me, and he says, "You have got it, have you?" and he throwed his hand back like he was going to get a pistol, and made a demonstration that way, and the threats he had made led me to believe that he was going to draw a pistol, and I just raised—I didn't have no shell in the barrel there, and I just threw one in as quick as I could to keep him from shooting me, and I threw in again and shot the third time, and as I shot the third time he fell, and I never shot any more then. I throwed a shell in my gun and walked around the barn to catch my horse. He had run off around the barn.
>
> Q. When you shot, how close were you to the barn door?
>
> A. I was about 4 feet, I expect, to the best of my knowledge. I was standing right in the barn door talking to Mr. Lowther, and as he was coming through the gate I thought I would step to one side, and if he wanted to go in the barn it would be all right and I would not be in his way. I made about one or two steps to the right, and I stood there, and he came right straight toward me and never went toward the door. He came right straight toward me.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

Q. You say when he come up that close to you he made that remark?

A. Yes, sir; he says, "You have got it, have you?" and made a demonstration——

Q. Describe what position he put himself in.

A. He was coming right straight toward me, and he throwed himself like that, and as he throwed his hand back that way I raised up and fired, and I shot him right here [indicating].

Q. Did he turn himself like you have indicated to you?

A. Yes, sir; he turned himself like that.

Q. When you commenced firing did you keep up the fire?

A. Yes, sir; I fired three shots just as fast as I could shoot.

Q. Can you shoot pretty quick?

A. Yes, sir; I am pretty fast with a Winchester.

Q. Did you advance on him?

A. I made, I guess, about one step. I was excited a little. I made one step as I fired the first shot. I made but one step while I was working the lever.

It further appeared that the Allison family had formerly lived in the State of Washington; that the family had moved away from that State because the old man had shot at one of his sons-in-law and been sent to the penitentiary a year for it there (pp. 10, 17); that after he had got out of the penitentiary the old man also came to the Indian country late in 1894 and located at John Farris's (p. 10); that he had made many threats against the lives of members of the family while in the State of Washington, and that he repeated these threats in the Indian country, referring specially to the defendant, John Allison. O. H. Knapp, a son-in-law, testi-

fied, for instance, that ten days before his death the old man had said: "Tell him I will blow Johnny's brains out and kill the whole damned flock inside of two weeks. One of us has got to die in two weeks" (p. 11).

The theory of the defense was that the defendant, being in terror on account of these threats, had reasonable cause for shooting his father as soon as he saw the latter apparently reaching for his hip pocket.

INSTRUCTIONS TO THE JURY.

The first twelve assignments of error relate to alleged errors in the charge to the jury. The passages referred to are to be found at the following pages of the record: First assignment, pages 31–2; second, page 34; third, page 34; fourth, page 35; fifth, pages 38–9; sixth, page 39; seventh, page 39; eighth, page 40; ninth, pages 40–1; tenth, page 44; eleventh, page 45; twelfth, page 37.

It will be noticed that the assignments of error do not correspond at all closely with the exceptions. Some of the assignments of error depend upon exceptions, while others are valueless as representing points not taken at the trial. (*Tucker* v. *United States*, 151 U. S., 164, 170.) Some are trivial. Those which seem to require attention we take up *seriatim*.

II. The second (and also the fifth) assignment attempts to bring up the question in the cases of *Goucke* v. *United States* (153 U. S., 183) and *Thompson* v. *United States* (155 U. S., 271). It does not appear whether the learned judge had in mind these decisions when he stated that his instructions were drawn to satisfy "even the most

technical and hair-splitting court" (p. 34). The instructions are in form different from that adopted in the cases referred to, and do not contain the error therein found, namely, the proposition that a person who has armed himself for an evil purpose is thereby incapacitated from defending himself even if self-defense is necessary to preserve his life. It seems unnecessary to consider these questions, as they are not raised by any exception which could possibly have called to the attention of the court the point which counsel now seeks to raise. He excepted to the instruction "upon the preparation of a weapon, saying to the jury what a certain state of facts will prove argument;" (p. 50) but this can hardly have conveyed much meaning to its hearers. He also excepted to the instructions "upon the subject of the conditions upon which a defendant would lose the benefit of the law of self-defense and the facts stated and principles of comparison used in the application of the principle laid down and its argumentative application" (p. 50). This is certainly too broad.

III. This assignment of error brings up the question whether malice aforethought exists when the purpose to kill "springs into his mind contemporaneously with the execution of it." It depends upon the following exception (p. 50):

> To the charge of the court upon the subject of malice aforethought, in saying that malice may be the conception of a moment. The fact that he executes it (the act) shows that he premeditated it.

The instruction referred to is as follows (p. 34):

> A man has the purpose to kill another wrongfully and improperly when he has no right to kill him, and *if that purpose springs into his mind contemporaneously with the execution of it that is premeditation*, because he can form a design to kill, and in this age, when we have these death-dealing weapons, improved as they are, *he can have that purpose and execute it at once*, and the fact that he has prepared himself to execute it, and the fact that he executes it, shows that he premeditated the act and that he thought of it a sufficient length of time to enable him to commit it in a systematic and regular way, and in a way to produce death, and that is thought of beforehand, that is premeditation.

A purpose executed at the moment when it is conceived does not come within the literal English signification of "malice aforethought." That phrase, however, has a very technical meaning derived from the very curious history of six centuries of legal development, and it includes in its legal signification a great deal which would not be included were the words first coined by a statute of our day.

No recent authorities are of value on this question, because murder has become almost everywhere a statutory crime, and has been generally divided into at least two degrees, the first degree being characterized by "premeditation and deliberation;" the first degree, in other words, representing the literal meaning of "malice aforethought," while lower degrees are provided to cover the cases where that phrase had acquired a technical and broader signification.

The history of the phrase is given by Mr. Justice Stephen in his "History of the Criminal Law of England," and more briefly by Mr. Bishop in his "New Criminal Law."

The Statute of Gloucester (6 Ed. 1, ch. 1) provides that when a killing is "*se defendendo ou par mesaventure*" the jury shall find that fact by a special verdict with a view to pardon. In other words, all homicide was at that time criminal. Justification or excuse, not being recognized as a defense, was provided for by the pardoning power. (3 Stephen's History of the Criminal Law of England, p. 36.) The customary form of special verdict in this case contained the phrase "in self-defense and not by felony or of malice aforethought" (p. 39). By the statute of 13 Ric. 2, c. 1, § 2, the King was cut off from the right to pardon in the case of "malice purpense." This was the first statutory recognition of the new phrase (p. 43). It was occasionally used in other statutes down to the time of Edward VI, and thus came to be a phrase used to denote generally the elements which distinguish murder from manslaughter. The extensive development in meaning of the phrase "malice aforethought" was probably due to the gross inadequacy of the punishment provided for manslaughter, a clergyable felony (pp. 43–4, 78–9). The doctrine of *implied* malice aforethought and identification of manslaughter with chance medley came from Coke (p. 54). This identification, characteristic of the conditions which prevailed in the seventeenth century, still seems to survive in the Indian country. (See charge of Judge Parker, at p. 36.)

Deliberate premeditation being thus too narrow a definition for "malice aforethought" (3 Stephen, 63), Mr. Justice Stephen prefers that given by Lord Chief Justice Holt in *Regina* v. *Mawgridge* (Kelyng, 119): "He that doth a cruel act voluntarily doth it of malice prepensed;" saying: "I know of no better definition of malice aforethought than the one given in Mawgridge's case, and I have frequently used it in directing juries." (3 Stephen, 70, 71, 73.)

In *People* v. *Clark* (7 N. Y., 385, 394) there is a very interesting discussion of this question by Judge Alexander S. Johnson (afterwards United States circuit judge), and his statement of the law is quoted with approval in *Hickory* v. *United States* (151 U. S., 303, 315):

> If there be sufficient deliberation to form a design to take life, and to put that design into execution by destroying life, there is sufficient deliberation to constitute murder, no matter whether the design be formed at the instant of striking the fatal blow or whether it be contemplated for months.

Judge Johnson adds:

> It is enough that the intention precedes the act, although that follows instantly.

In *United States* v. *Cornell* (2 Mason, 60, 67,) Mr. Justice Story in his discussion of this definition says:

> But it includes also all cases of homicide, however sudden, which are attended with such cruel circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; or, to use the language of Sir Michael Foster, with such circumstances as carry in them "the plain indications of a heart regardless of social duty and fatally bent on mischief."

In *Commonwealth* v. *York* (9 Met., 93, 102, 103) Chief Justice Shaw said:

> The distinguishing characteristic of murder is homicide with malice aforethought, express, or implied by law. * * * But however suddenly any act is done the intent to do it precedes the doing of it, and the act is done in pursuance of the intent and formed design. However short the interval, the intent necessarily precedes.

In *Commonwealth* v. *Webster* (5 Cush., 295, 306) Chief Justice Shaw says:

> It is manifest, therefore, that the words "malice aforethought" in the description of murder do not imply deliberation or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance.

In *State* v. *McDonnell* (32 Vt., 491, 516) Chief Justice Redfield says:

> No time is too short for a wicked man to form in his mind a scheme of murder and to contrive the means of accomplishing it.

Hence Mr. Bishop says that "the effect of the word 'aforethought' is not great" (1 Bish. New Crim. Law, § 429), and considers the definitions of the phrase as of little value (2 id., § 675). He says (2 id., § 677):

> The word "aforethought" in the definition of murder has been held to mean almost if not quite nothing. There is no particular period during which it is necessary the "malice" should have existed or the prisoner should have contemplated the homicide.

> If, for example, the intent to kill or to do other great bodily harm is executed the instant it springs into the mind, the offense is as truly murder as though it had dwelt there for a longer period. Still, premeditation may be an element showing malice when otherwise it would not sufficiently appear.

He therefore lays down the general principles as follows (§ 695):

> Where the killing is intended and is not lawful, it is generally murder; but under circumstances of provocation or of mutual combat it may be reduced to manslaughter. If the law authorizes or permits it, there is no crime. To render an intentional killing murder there is no need that the purpose to take life should have existed any particular time before the act is performed.

VI. Counsel complains that the court in discussing the right of self-defense allows it to the prisoner only when he had reason to believe that an attack was about to be made upon his own life (p. 39). Immediately below on the same page, however, the court corrects any misapprehension that may have arisen from his language on this point by adding the words "or to do him great bodily harm." There is no exception to support this assignment of error.

VII. This assignment of error questions the following points in the charge (p. 39):

> If a man is attacked by another in a deadly way, his duty is to get away from that attack; it is to avoid it. That is his duty to himself, because he may get killed from it. His own safety commands it. His duty to the man attacking him commands it.

It will be noticed that this passage lays down the supposed legal principle of a necessity to retreat from an attack somewhat as it was laid down in Selfridge's case, as quoted by the Chief Justice in *Stave* v. *United States* (153 U. S., 614, 621). A large number of other cases to the same point were cited by counsel for the United States in *Babe Beard* v. *United States* (159 U. S., 550). The doctrine is examined by the court in that case in a learned opinion by Mr. Justice Harlan, and is shown to have no foundation, regarded as a legal principle. It is referred to by Mr. Justice Stephen as a doctrine peculiarly due to the conditions of life in the sixteenth and seventeenth centuries. (3 Stephen's Hist. Crim. Law of Eng., p. 59.)

It is a curious fact that this charge was delivered to the jury on the very day upon which the Babe Beard case was decided, and when, therefore, the learned trial judge did not have the benefit of its assistance. While, however, the necessity of retreat is not a legal doctrine and is not applicable to the facts of the Babe Beard case, nevertheless a man must sometimes retreat from an attack in order to establish as a matter of fact that he took all reasonable precautions. It is submitted that in the present case the actions of his father did not justify defendant in doing anything more than load his gun, get in readiness to fire, and retreat slowly. Hence, read in the light of the facts of this case (*Spalding* v. *Custer*, 153 U. S., 38), the remarks of the court were proper enough.

This assignment of error, however, is not founded upon any exception. It is therefore unavailable to

plaintiff in error, for which reason, doubtless, it is not enlarged upon in the brief filed by his counsel.

IX. This assignment of error is based on the following exception (p. 50):

> To the charge of the court in saying that the defendant must have something more than his own statement as to how the killing occurred to prove that he is justified in the killing; every man would say that.

The passage quoted in the assignment can not be correctly understood without reading it in connection with the other instructions at the same time given on that subject. The whole passage is as follows (pp. 40–41):

> *You have heard in argument here*, incidentally dropped, no doubt, because these things have been repeated here so often in this court that every child knows what the law of self-defense is, that *if a man thinks he has a right to slay he can slay.* That is a great misapprehension of what this proposition of the law is, and what it means. If that was the case *how many men, when they were arraigned for the killing of a human being, would not assert that they thought they had a right to kill; they might be mistaken, but they thought so. I perhaps had a misunderstanding of the law, but then they thought they had the right to kill.* What a perversion of this protection agency called the law of the land this would be. No, that is not the law. It must be shown by the evidence that the party who was slain was at the time doing something that would satisfy a reasonable man, situated as was the defendant, that the deceased, William Allison, then and there was about to do that which would destroy the life of the defendant, and that he could not prevent it except by doing as

he did do. *The question as to whether that is the state of case or not is a question that is to be finally passed upon by the juries of the country, and by you in this case, and you must have something more tangible, more real, more certain than that which is a simple declaration of the party who slays, made in your presence by him as a witness when he is confronted with a charge of murder. All men would say that. No men created would say otherwise when confronted by such circumstances, and the juries, as a matter of fact, would have nothing to do but to record the finding which was willed or established by the declaration of the party who did the killing.* Now, the law does not mean that. It means, according to its language here, that there must have been made upon the defendant, or about to be made, so nearly being executed that he could not get away from it, that which *seemed to be* a real attack by William Allison, and an attack, too, of a deadly character, or of a character that might inflict great violence upon his person, and that he could not escape from it, just as under the other proposition he is required to do, or that he could not avoid it except by using the degree of violence that he did use, by firing first into the body and then into the head of the man that he shot.

The three sentences beginning with the words, "The question as to whether that is the state of case or not," are those which are questioned by the assignment of error. The sentence next preceding is that referred to in the eighth assignment of error, which is not based upon an exception.

It will be noticed that while the words quoted are ambiguous, yet, read in connection with the rest of the charge, they show clearly that the judge did not mean,

and the jury can not have understood him as meaning, that the defendant could not prove a defense by his own testimony alone. The meaning of the court is clear enough that the jury can not rely on the defendant's opinion as to what he should have done as a reasonable man; he must give them the facts upon which his opinion was based. Otherwise defendants in capital cases could get off by simply testifying that they "thought they had a right to kill; they might be mistaken, but they thought so" (p. 40).

X, XI, XII. These assignments of error are based on a proposition laid down by the court, that threats proved to have been made by deceased against the life of defendant can be "considered to show that he killed him because of malice," etc. (See *Thompson* v. *United States*, 155 U. S., 271, 281.) The meaning of this is that such threats may be considered by the jury as supplying evidence of motive, and thus establishing that the killing was "with malice aforethought" instead of merely accidental. Thus defendant may have had the idea that in order to save his own life he had a right to hunt his father up and put him out of the way. This mistake of law on defendant's part would not justify, excuse, or mitigate the offense. He would be guilty of murder; and therefore, although he had no express malice, would be guilty of malice aforethought within the meaning of the law. The learned judge, however, goes on to say that it was "evidence of spite," "evidence of grudge," etc. If exception had been duly taken to these remarks no doubt a reversal would be

necessitated by the Thompson case. The only exception, however, is a general one "upon the subject of previous communicated threats and uncommunicated threats, that the charge upon that subject is argumentative and misleading" (p. 51). This certainly does not satisfy the objects of an exception as stated in *Beaver* v. *Taylor* (93 U. S., 46, 55), and lately applied by this court in the murder case of *Thiede* v. *Utah* (159 U. S.):

> It is not the duty of a judge at the circuit court, or of an appellate court, to analyze and compare the requests and the charge to discover what are the portions thus excepted to. One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it and give new and different instructions to the jury, if in his judgment it should be proper to do so.

OTHER EXCEPTIONS.

The assignments of error other than those to instructions of the court all relate to the exclusion of secondary evidence relating to a certain letter alleged to have been written by the deceased to his wife. It is to be borne in mind that this letter was written from the State of Washington sometime before the deceased went to the penitentiary. As his term in the penitentiary was for a year, the letter seems to have been written at least fourteen or fifteen months prior to the killing. It was offered as affording cumulative evidence on the subject of threats (p. 25), and was not connected with the case by any offer to prove that it had been communicated to defendant.

The court seems to have given defendant's counsel every opportunity to get his offer of proof into satisfactory shape, only refusing to allow him to do this in the presence of the jury (p. 25).

It was proved that a letter from defendant to his wife had been delivered by the latter to one of defendant's counsel, and it was also proved that a search was made through the latter's office at the time of the trial without finding the letter. There seems to have been sufficient proof of search to bring the case within the discretion of the court, so that it would have been justified in its discretion in allowing secondary evidence of the contents of the letter, but not enough to make a requirement of further evidence an abuse of discretion. Loopholes were left in the case, and the court seems to have had some reason to regard counsel with suspicion (p. 24). The diligence requisite varies with the special circumstances of each case (1 Wharton on Evidence, §§ 147, 148). While judgments have been reversed for error in admitting or excluding copies (*Patterson* v. *Winn*, 5 Pet., 233) it is respectfully submitted that the case must largely be left to the discretion of the trial judge who sees the witnesses, and, when they are members of the bar of his court, has some knowledge of their character. His rulings in this regard, not constituting in any sense an abuse of discretion, can not therefore be reviewable. (*Kearney* v. *The Mayor*, 92 N. Y., 617, 620; 1 Thompson on Trials, § 806.)

The court's discretion in matters of this nature is similar to its recognized discretion in passing upon the

qualifications of an expert witness (*Inland Coasting Co.* v. *Tolson*, 139 U. S., 551), or the sufficiency of a notice to produce (Abbott's Trial Brief, Criminal Causes, § 455).

It is, however, to be remarked that the bearing of this letter would have been very remote. There was much testimony as to threats made very shortly before the killing, and this testimony was undisputed. The court's discretion in such matters enables it, without endangering the judgment, to exclude remote testimony (*Alexander* v. *United States*, 138 U. S., 353), just as, if it thinks best, it can admit the testimony. (*Moore* v. *United States*, 150 U. S., 57; *Thiede* v. *Utah*, 159 U. S., —.) Defendant can not have been prejudiced by the exclusion of this antiquated piece of cumulative evidence.

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.